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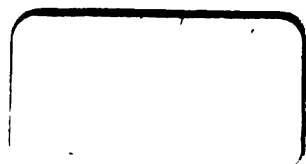


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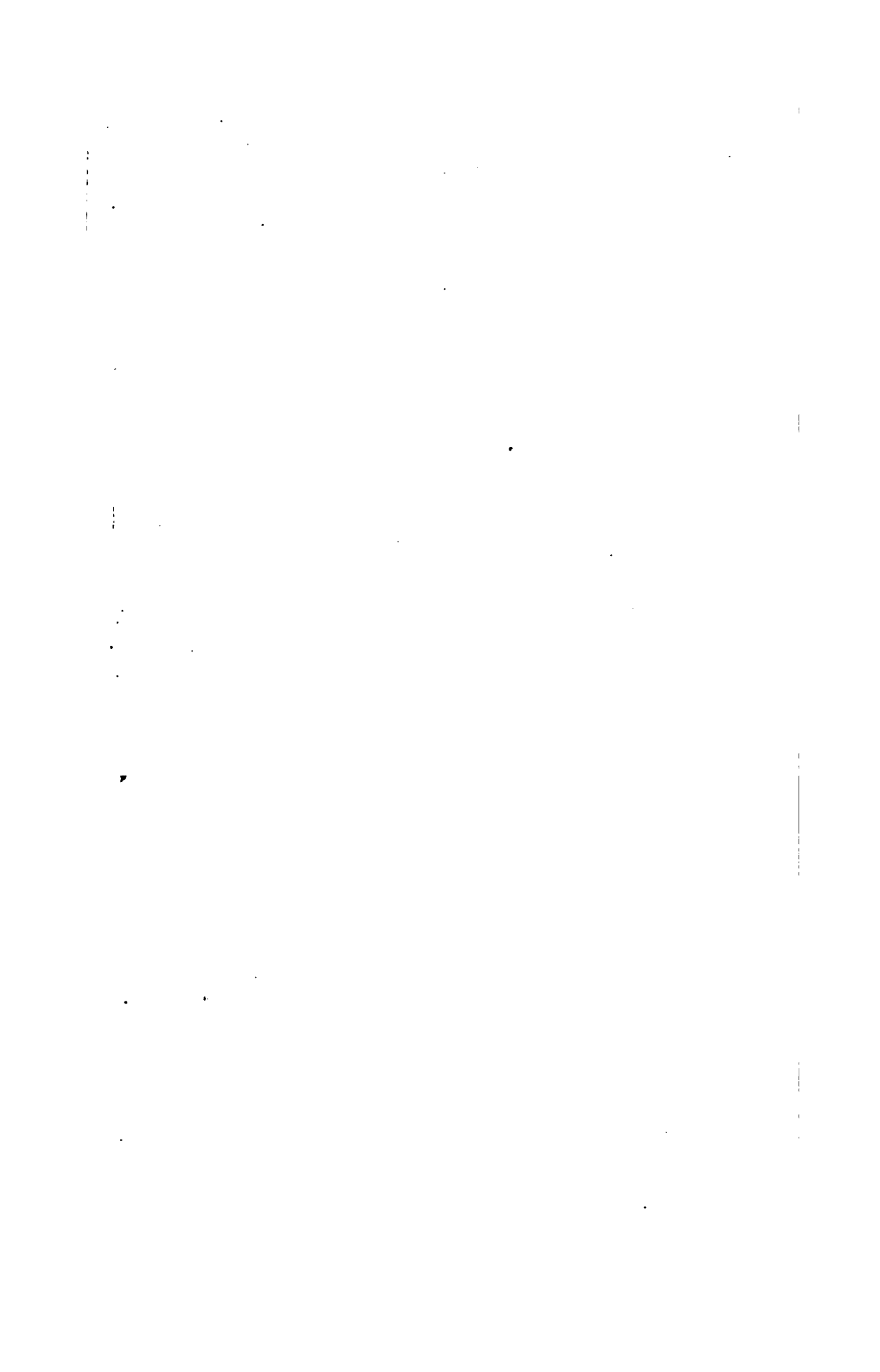


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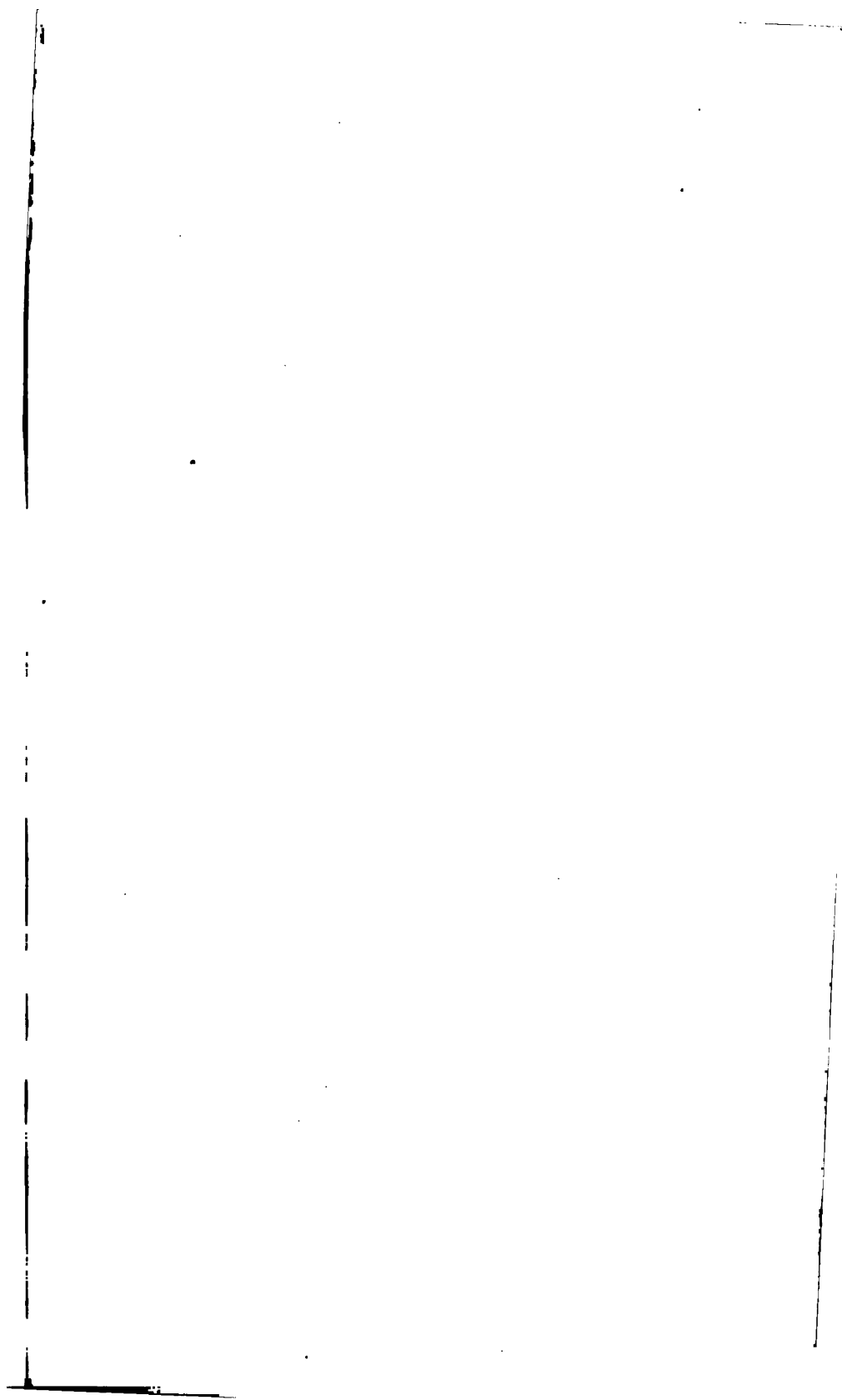
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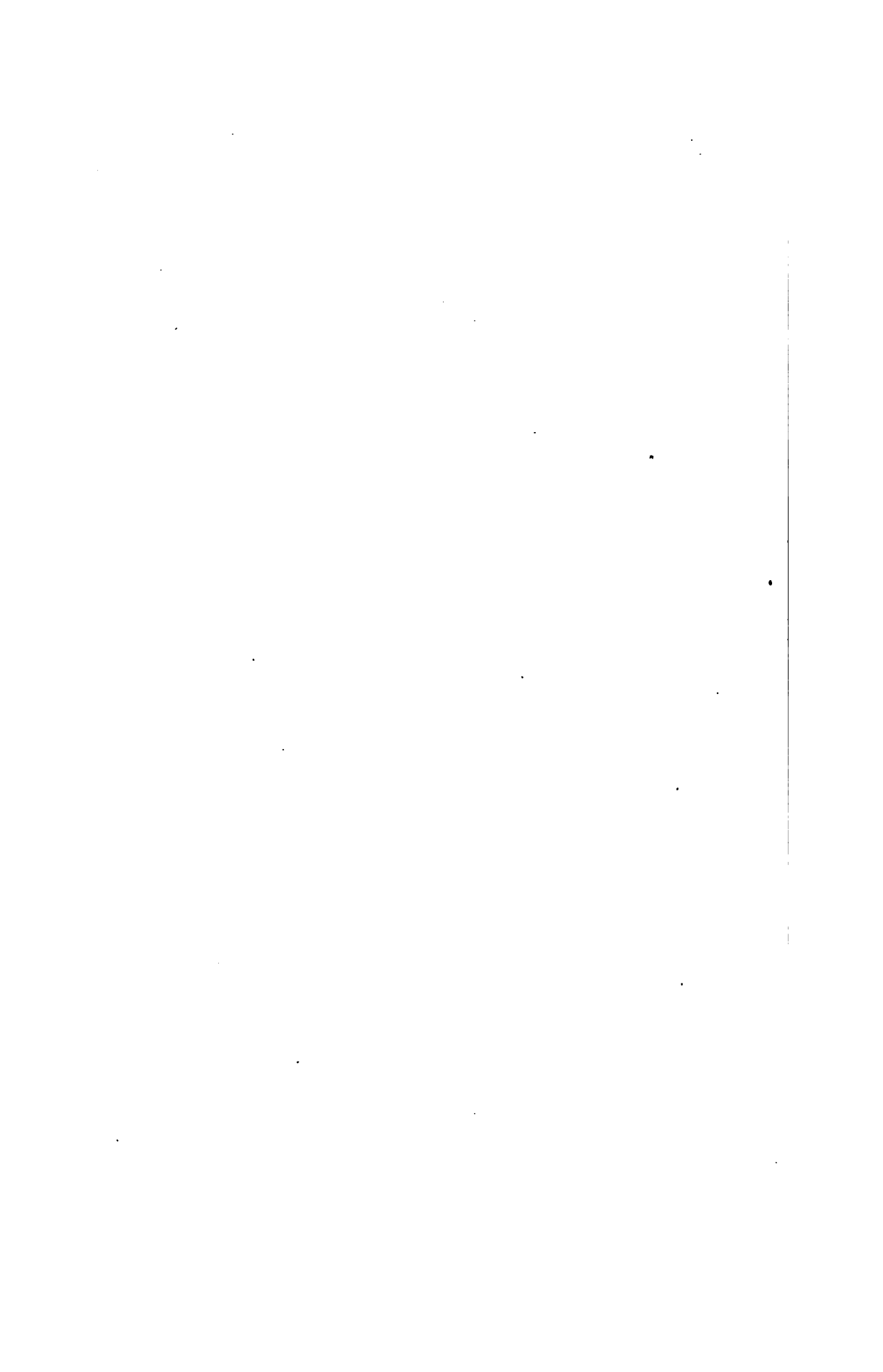
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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF JUDICATURE**  
**OF THE**  
**STATE OF INDIANA,**  
**WITH TABLES OF THE CASES REPORTED AND CASES**  
**CITED AND AN INDEX.**

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**By AUGUSTUS N. MARTIN,**  
**OFFICIAL REPORTER.**

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**VOL. LXIV.,**

**CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1878,**  
**NOT REPORTED IN VOLS. LXII. AND LXIII.**

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JUDGES  
OF THE  
SUPREME COURT  
OF THE  
STATE OF INDIANA,  
DURING THE TIME OF THESE REPORTS.

---

HON. GEORGE V. HOWK.\*†

HON. WILLIAM E. NIBLACK.†

HON. JAMES L. WORDEN.†

HON. SAMUEL E. PERKINS.†

HON. HORACE P. BIDDLE.†

\*Chief Justice at November Term, 1878.

†Term of office commenced January 1st, 1877.

‡Term of office commenced January 4th, 1875.

**OFFICERS**  
**OF THE**  
**SUPREME COURT.**

---

**CLERK,**  
**GABRIEL SCHMUCK.**

**SHERIFF,**  
**JAMES ELDER.**

**LIBRARIAN,**  
**FREDERICK HEINER**

### JUDGES OF THE CIRCUIT COURTS.

NO. CIR.	NAME	RESIDENCE	TERM EXPIRES
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19	Joshua G. Adams .....	Danville .....	October 14, 1884.
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24	Eli B. Goodykoonts .....	Anderson .....	October 19, 1885.
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**CASES**  
**ARGUED AND DETERMINED**  
 IN THE  
**SUPREME COURT OF JUDICATURE**  
 OF THE  
**STATE OF INDIANA,**  
 AT INDIANAPOLIS, NOVEMBER TERM, 1878, IN THE  
 SIXTY-THIRD YEAR OF THE STATE.

—◆—

**DALY ET AL. v. THE NATIONAL LIFE INSURANCE COMPANY  
 OF THE UNITED STATES OF AMERICA.**

64	1
134	219
64	1
153	203
64	1
156	700

**"FOREIGN CORPORATION" DEFINED.**—The statutes of this State define a foreign corporation to be "a corporation created by or under the laws of any other state, government or country," or one "not incorporated or organized in this State."

**SAME.**—*Insurance Company Created by Act of Congress.*—An insurance company created by an act of Congress is a foreign corporation subject to the requirements of the statute of this State approved June 17th. 1852, "respecting foreign corporations and their agents in this State." 1 R. S. 1876, p. 878.

**SAME.**—*Congress as a Local Legislature.*—*Constitutional Law.*—An act of Congress creating a private corporation is the act of Congress as the local Legislature of the District of Columbia; as Congress can not, under the federal constitution, as the Congress of the United States, create a private corporation.

**SAME.**—*Act Regulating Foreign Insurance Companies.*—*Repeal of Statute.*—*Foreign State.*—The act of December 21st, 1865, "regulating foreign insurance companies," etc., 1 R. S. 1876, p. 594, applies to insurance companies "incorporated by any other State than the State of Indiana" and those "incorporated by any government foreign to the United States," but not



*Daly et al. v. The National Life Ins. Co. of the United States of America.*

to those created by Congress ; and, as to the latter class of companies, such act does not repeal said act of June 17th, 1852.

**SAME.**—*Loaning Money.*—Said act of December 21st, 1865, does not so apply to foreign insurance companies, as to enable them to loan money through their agents, in this state, without complying with the provisions of said act of June 17th, 1852.

**SAME.**—*Foreclosure of Mortgage by Foreign Corporation.*—*Failure to comply with Act Concerning Foreign Corporations and Agents.*—*Plea in Abatement.*—In an action by an insurance company created by an act of Congress, to foreclose a mortgage on lands in this State, executed by a husband and wife to secure the payment of a loan made to the husband by the plaintiff through its local agent in this State, and to recover the mortgage debt, it is a good answer as a plea in abatement, to allege the failure of the plaintiff and its agent to comply with the requirements of said act of June 17th, 1852.

**SAME.**—*Effect of such Failure.*—Such failure does not render the mortgage void, but merely suspends the right to foreclose it until the provisions of such act shall have been complied with.

**SAME.**—*Loan by Insurance Company.*—*Charter.*—*Ultra Vires.*—A section of the charter of such insurance company, authorizing it to invest its capital, etc., in "bonds, and mortgages on unencumbered real estate," sufficiently authorized the taking of the mortgage in suit.

**SAME.**—*Husband and Wife.*—*Quieting Title.*—A failure to comply with the requirements of said act of June 17th, 1852, is not sufficient ground to sustain a cross complaint by the wife, the owner of the mortgaged premises, to have the mortgage declared null and void and to quiet her title against it.

**SAME.**—*Set-Off.*—A cross complaint in the nature of a set-off, for moneys alleged to be due and owing from such plaintiff to the husband, may properly be pleaded in such action.

Dissenting opinion by BIDDLE, J.

From the Tippecanoe Circuit Court.

*W. C. Wilson* and *J. H. Adams*, for appellants.

*J. L. Miller* and *M. Jones*, for appellee.

Howk, C. J.—This was an action by the appellee, as plaintiff, against the appellants, as defendants, to recover the amount of a note executed by the appellant Owen Daly, to the appellee, and to foreclose a mortgage executed by said Daly and his wife, to secure the payment of said note, on certain real estate in Tippecanoe county. The other ap-

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pellants were made parties defendants, as junior mortgagees.

The appellants separately and severally demurred to the appellee's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, and because the appellee had no legal capacity to sue; which demurrers were severally overruled, and to these decisions the appellants separately excepted.

The appellants Owen Daly and Catharine Daly, his wife, jointly answered in three affirmative paragraphs; the fourth paragraph was in the nature of a cross complaint by the appellant Catharine Daly, and the fifth paragraph was a set-off by the appellant Owen Daly.

The appellee demurred "separately to the first, second and third paragraphs of the joint answer of the defendants Owen and Catharine Daly, and to the separate answers of each of said defendants, and assigns for cause, that they, nor either of them, state facts sufficient to constitute a defence to the plaintiff's complaint;" which demurrer was sustained by the court as to each of said paragraphs or answers, to which decisions the appellants Owen and Catharine Daly severally excepted.

The other appellants made default, and, the appellants Owen and Catharine Daly refusing to answer further, a finding and judgment were made and rendered in favor of the appellee, for the amount of the note in suit, and for the foreclosure of the mortgage and the sale of the mortgaged property, etc., as prayed for in the appellee's complaint.

In this court, the appellants Owen and Catharine Daly have assigned as errors the decisions of the circuit court in overruling their demurrer to the complaint, and in sustaining the appellee's demurrer to the several paragraphs of their answer.

We will consider and decide the several questions presented by these alleged errors, in the order of their assignment.

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1. In their argument of this cause in this court, the appellants' counsel have not even alluded to the alleged error of the court, in overruling their demurrer to the complaint. The error, if it existed, is therefore waived.

2. In the first paragraph of their joint answer, the appellants Owen and Catharine Daly admitted the execution of the notes and mortgage described in the complaint, but they alleged, in substance, that the appellees ought not to recover judgment thereon, because they said that the appellee was a corporation created by an act of the Congress of the United States of America, approved July 25th, 1868, a copy of which act was filed with and made part of said paragraph; that the appellee, after its organization, to wit, on the 10th day of January, 1872, at the city of Lafayette, Indiana, received of said appellants said notes and mortgage, and that the appellee was then and there transacting business by one William J. Cunningham, local agent of the appellee for Lafayette aforesaid; that, on said 10th day of January, 1872, the execution and delivery of said notes and mortgage to the appellee, through the agency and employment of said William J. Cunningham, was wholly unlawful, in this, that at no time before the execution of said notes and mortgage, nor at any time since, while he acted as such agent, did the said William J. Cunningham deposit in the clerk's office of Tippecanoe county, Indiana, the power of attorney, commission, appointment or other authority, under or by virtue of which he acted as agent of the appellee, nor did said Cunningham, before or since transacting said business with said appellant Owen Daly file with the clerk of the circuit court of Tippecanoe county, Indiana, a duly authenticated order, resolution or other sufficient authority of the board of directors or managers of the appellee corporation, authorizing citizens or residents of this State having a claim or demand against such corporation, arising out of any transaction in this State with such agent, to sue for and maintain

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an action in respect to the same in any court of the State of competent jurisdiction, and further authorizing service of process in such action on such agent to be valid service on such corporation, and that such service shall authorize judgment and all other proceedings against such corporation; nor did said corporation appellee, nor any one else for said appellee or said Cunningham, file as aforesaid either of the papers aforesaid, as required by law. Wherefore said appellants said, that said notes and mortgage were illegal and void, and the appellee ought not to recover judgment thereon as asked in its complaint.

This paragraph of answer, as is manifest from its averments, was founded upon the provisions and requirements of the 1st and 2d sections of "An act respecting foreign corporations and their agents in this State," approved June 17th, 1852. 1 R. S. 1876, p. 373. The paragraph is a good defence, not in bar, but in abatement of the action as one prematurely brought, if the appellee was and is a foreign corporation. The notes and mortgage were not void by reason of the non-compliance of the appellee and its agent, Cunningham, with the requirements of the act cited; but, if the appellee was a foreign corporation, and if, at the commencement of this suit, neither the appellee nor its agent had complied with the provisions of the statute, then this action was prematurely brought, and, for this reason, it must abate. *The Walter A. Wood Mowing, etc., Machine Co. v. Caldwell*, 54 Ind. 270.

For the purposes of this case, it is admitted by the appellee's demurrer to the first paragraph of the answer, that, when this suit was commenced, neither the appellee nor its agent had complied with the requirements of the foreign corporations act, before cited. So far as this paragraph of answer is concerned, therefore, the only question for our decision is this: Was and is the appellee a foreign corporation, within the meaning of the statutes of this State?

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In section 1 of the foreign corporations act above cited, the General Assembly of this State has indicated, in plain language, what are foreign corporations within the purview of the act. They are corporations "not incorporated or organized in this State." In article 40, section 681, of the practice act, the Legislature has again defined a foreign corporation as "a corporation created by or under the laws of any other state, government or country." 2 R. S. 1876, p. 281.

The appellee was not incorporated or organized in this State, but it was and is a corporation created by and under the laws of another government, to wit, that of the United States. The appellee was incorporated by an act of the Congress of the United States, and its counsel claim, that, for this reason, it is "governed by a law paramount to the laws of this State." The United States is a government whose powers are limited by the constitution of the United States. The Congress of the United States, in so far as it legislates for that government, has neither the right nor the power to incorporate a private corporation, such as is the appellee. In addition, however, to the power conferred upon Congress by the constitution of the United States, to legislate for that government, it is expressly provided in that instrument that the same Congress shall have power "To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States." Under this provision of the constitution, the Congress became and was the local Legislature of the District of Columbia, and as such, and as such only, it had the right and the power to provide for the incorporation of a private corporation, such as the appellee, within and for said District. Although the statute under which the appellee became incorporated was enacted by the Congress of the United States, yet, in its enactment, Congress was acting,

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and could only act, as the Legislature of the District of Columbia; and, under this statute, the appellee became and was a corporation, not of the United States, but of said District.

This *status* of the appellee, as a corporation, is recognized by Congress, in section 10 of the act under which it was incorporated, in which section it was expressly stipulated, that the "local habitation," the office of the appellee, "shall be located in the city of Washington, in the District of Columbia." Not only so, but while the appellee is authorized to "establish branches or agencies elsewhere," it was further stipulated in said section 10, that this should be done "subject to the laws of the states respectively in which they may be established." It seems very clear to us, that the appellee was and is a foreign corporation, within the purview and meaning of the act before cited, "respecting foreign corporations and their agents in this State."

The point is made by the appellee's attorneys, in their brief of this cause, "that the act of December 21st, 1865, in relation to foreign insurance companies, supersedes and repeals the general act of June 17th, 1852," before cited, "respecting foreign corporations and their agents in this State."

The act of December 21st, 1865, regulating foreign insurance companies, contained no repealing clause or section. If, therefore, it repealed any prior legislation, it was not an express repeal, but a repeal by implication. Such a repeal—a repeal by implication—arises where the later legislation is clearly inconsistent, and in conflict, with the provisions of the older statute. Where the two enactments are irreconcilable, one with the other, the later statute stands, and operates as a repeal of the prior enactment, to the extent, and only to the extent, of the conflict between the two statutes.

The act of December 21st, 1865, by its express terms, is

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applicable to two classes of foreign insurance companies, and to their transaction of a particular business within the State of Indiana; and that far forth the provisions of that act supersede, and virtually repeal, as the later expression of the legislative will, so much of the foreign corporations act of June 17th, 1852, as is in conflict with those provisions. But if the appellee is a foreign insurance company, which does not fall within either of the two classes of such companies mentioned in the later act, or if the appellee, in its dealings with the appellants, was engaged in a business, the transaction of which the later act did not attempt to regulate or restrain, in either event it can not be said, as it seems to us, that the provisions of the act of December 21st, 1865, as applicable to the case at bar, have superseded or repealed, or in any manner impaired, any of the requirements of the act of June 17th, 1852, respecting foreign corporations or their agents in this State.

The appellee was a foreign insurance company; but, as we have said, it did not fall within either of the two classes of foreign insurance companies, mentioned in the act regulating such companies, doing business in this State, approved December 21st, 1865. 1 R. S. 1876, p. 594.

The 1st section of said act relates to companies "incorporated by any other State than the State of Indiana."

Section 2 of said act contains provisions in relation to companies "incorporated by any government foreign to the United States." The appellee was not "incorporated by any other State than the State of Indiana," nor "by any government foreign to the United States;" therefore it is clear, that the act of December 21st, 1865, was not applicable to the appellee. The act in question attempted, and was intended, to regulate foreign insurance companies, only in the transaction of the "business of insurance," and of no other business; therefore it is clear, that the provisions of said act were not applicable to the transaction

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of the particular business mentioned and described in the first paragraph of the appellants' answer.

In conclusion, therefore, we hold, that the appellee was and is a foreign corporation, within the purview and meaning of the act of June 17th, 1852, respecting foreign corporations and their agents in this State, and bound to comply with the requirements of that act; and, as the first paragraph of the appellants' joint answer stated very clearly the non-compliance of the appellee and its agent with those requirements, we think that the appellee's demurrer to that paragraph ought to have been overruled.

3. The second paragraph of the appellants' joint answer sets up substantially the same matters which are stated in the first paragraph of said answer; and it contains some additional matters in relation to the issue of a policy of insurance by the appellee on the life of the appellant Owen Daly, etc, which we regard as immaterial.

For the reasons given by us in considering the sufficiency of the first paragraph of said answer, we think that the circuit court erred in sustaining the appellee's demurrer to the second paragraph of said joint answer.

4. In the third paragraph of their joint answer, the appellants Owen and Catharine Daly alleged, in substance, that they admitted the execution of the notes and mortgage set forth in appellee's complaint, but they said, that the appellee ought not to maintain an action thereon, because the appellee was a corporation organized under an act of Congress approved July 25th, 1868, a copy of which act was filed with and made part of said paragraph of answer; that said notes and mortgage were not executed by them as the evidence of, or security for, any loan of money or other thing of value previously contracted, for money due to the appellee from said appellants, or either of them, but that the same were the first and original transaction between the appellee and the appellant



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Owen Daly, and were for the original loan of money therein made by the appellee to the said Owen Daly; and the appellants averred, that the appellee had no authority, by virtue of its said charter, to make said loan and take said notes and mortgage set forth in the complaint, and that said notes and mortgage were wholly void, for want of such authority. Wherefore the appellants said that the appellee ought not to maintain this action.

It will be seen from the averments of this paragraph, that the appellants claim therein, that the acts of the appellee in making the loan to the appellant Owen Daly, and in taking the notes and mortgage in suit as evidence of and security for such loan, were *ultra vires*, and therefore wholly void. In support of this position, the appellants' counsel rely upon a clause of the fifth section of the appellee's charter, wherein it is provided that it shall be lawful for the appellee "to purchase, hold and convey such real estate," among others, "as shall have been mortgaged to it, in good faith, by way of security for loans previously contracted for moneys due." If the appellee derived its powers to loan its money, and to accept of mortgaged security therefor, solely from the fifth section of its charter, there might be room, perhaps, for questioning the validity of the notes and mortgage in suit, under the facts alleged in the third paragraph of the answer. But, in section 6 of its charter, the appellee was expressly authorized to invest its capital, profits and surplus funds in such securities, and in such manner, as it might elect, and it was required to invest its re-insurance fund, among other securities, in "bonds, and mortgages on unincumbered real estate." It is very clear, we think, that the acts of the appellee in making the loan to Owen Daly, and in accepting his notes and the appellants' mortgage therefor, were not *ultra vires*, and were not therefore void.

5. The fourth paragraph is a separate cross complaint

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by the appellant Catherine Daly, in which she alleged, in substance, that the mortgaged property was her separate estate, and that the mortgage in suit was a cloud upon her title; that the mortgage was void, upon two grounds:

1. That the appellee's acts in making the loan, and in taking the notes and mortgage, were *ultra vires*; and,

2. By reason of the non-compliance of the appellee and its agent, Cunningham, with the requirements of the foreign corporations act of June 17th, 1852.

The notes and mortgage, as we have seen, were not void upon either of these grounds, and therefore the appellee's demurrer to the cross complaint of said Catharine Daly was properly sustained.

6. In the fifth paragraph, the appellant Owen Daly, by way of cross complaint against the appellee, separately alleged, in substance, that the appellee was indebted to him, said Owen Daly, in the sum of two hundred and eight dollars and forty-one cents, for money had and received on or about the 18th day of January, 1872, by the appellee of said appellant, which said sum, with interest thereon, was due and owing by the appellee to said appellant, and said appellant demanded judgment for three hundred dollars, and for general relief.

This paragraph was a cross action, in the nature of a set-off against the appellee's cause of action. It was not, and did not purport to be, a defence to the suit of the appellee. The paragraph was sufficient, upon the appellee's demurrer thereto for the want of facts, to constitute a good cross action. *Clafin v. Dawson*, 58 Ind. 408; and *Boil v. Simms*, 60 Ind. 162.

Probably a motion to make the paragraph more specific, or a motion for a bill of particulars, if either had been made, ought to have been sustained; but we think that the appellee's demurrer to the paragraph was erroneously sustained.

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The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to overrule the demurrer as to the first, second and fifth paragraphs of the answer, and for further proceedings in accordance with this opinion.

DISSENTING OPINION.

BIDDLE, J.—I can not concur with my brother judges in holding that "The National Life Insurance Company of the United States of America," created by an act of Congress, is a foreign corporation, within the meaning of the acts of the General Assembly of this State.

I do not discuss the power of Congress to incorporate an insurance company; there is no such question before us. The corporation exists; the appellants have recognized it by contracting with it, and have not denied its existence. Their answers admit its existence and validity. Indeed, its validity can only be questioned by a direct proceeding instituted for that purpose. *The Brookville and Greensburg Turnpike Co. v. McCarty*, 8 Ind. 392; *The President and Trustees of Hartsville University v. Hamilton*, 84 Ind. 506; *The Adams Express Co. v. Hill*, 43 Ind. 157.

The act approved June 17th, 1852, is entitled "An act respecting foreign corporations and their agents in this State." It does not mention insurance companies either in the title or the body of the act. The title of the act approved December 21st, 1865, is as follows:

"An act regulating foreign insurance companies doing business in this State; prescribing the duties of the agents thereof and of the Auditor of State in connection therewith, and providing penalties for the violation of this act."

The latter law embraces the particular subject which falls within the general subject of the former act, and must be held to repeal the former act, as to that particular subject. Such I understand to be the

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true rule in interpreting statutes. *Place v. The State*, 8 Blackf. 319; *The President and Directors of the Peru and Indianapolis R. R. Co. v. Bradshaw*, 6 Ind. 146; *The State v. Horsey*, 14 Ind. 185; *DePauw v. The City of New Albany*, 22 Ind. 204; *Blakemore v. Dolan*, 50 Ind. 194. Besides, this court has already held that the act of December 21st, 1865, is a substitute for the act of June 17th, 1852, as far as foreign insurance companies are involved, and as to such companies repeals the former act. *Hoffman v. Banks*, 41 Ind. 1; *The Farmers and Merchants Ins. Co. v. Harrah*, 47 Ind. 236; *The Walter A. Wood Mowing, etc., Machine Co. v. Caldwell*, 54 Ind. 270. Yet, if I understand the opinion of a majority of this court, it rests the validity of the first and second paragraphs of the appellants' answer on the act of June 17th, 1852, and holds that the appellee is not included in the act of December 21st, 1865. As the whole subject of insurance companies was re-enacted in the latter act, and as this court has held that the latter act, as to insurance companies, is a substitute for and repeals the former act as to insurance companies, the conclusion would follow that the appellee is not under any restriction to sue in this State, by either of the acts mentioned.

The act of December 21st, 1865, having re-enacted the whole subject of foreign insurance companies, and essentially changed the provisions touching foreign insurance companies, from those concerning foreign corporations in the act of June 17th, 1852, I hold, that the latter act, as to foreign insurance companies, repeals the former act.

So far, and for these reasons, I am constrained to dissent from my learned brothers.

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SHINN v. THE STATE.

CRIMINAL LAW.—*Robbery*.—*Constructive Violence*.—Though the distinguishing feature of robbery is violence, yet robbery may be committed without

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actual violence, as by exciting fear in the person robbed, which, in law, constitutes constructive violence.

**SAME.**—The violence necessary to constitute robbery must be more than a sudden taking or snatching of the property, and must precede or accompany the taking.

**SAME.**—*Fraud.*—*Trick.*—The fraudulent and felonious taking of property by means of a trick or contrivance, but unaccompanied by violence, does not constitute robbery.

From the Madison Circuit Court.

*J. W. Sansberry*, for appellant.

*T. W. Woollen*, Attorney General, for the State.

**NIBLACK, J.**—The prosecution in this case was upon an indictment containing two counts.

The first count charged, that Robert Shinn and another person, whose name was to the grand jury unknown, “ on the 15th day of August, A. D. 1878, at,” etc., “ did then and there unlawfully, forcibly and feloniously, take from the person of Ithamar McCarty, by violence, three ten-dollar National bank bills, of the value of ten dollars each, and of the aggregate value of thirty dollars, upon a National bank and National banks to the said grand jury unknown, of the personal property, goods and moneys of Jasper N. McCarty.”

The second count charged the same persons with stealing, taking and carrying away three ten-dollar National bank bills, describing such bills in the same manner as in the first count.

Shinn, the appellant, plead not guilty, and, upon a trial by a jury, was found guilty of the robbery charged in the first count of the indictment. His punishment was fixed at a fine of one dollar and at imprisonment in the state-prison for two years.

Disregarding a motion for a new trial, the court rendered a judgment of conviction upon the verdict.

One of the causes assigned for a new trial was the insufficiency of the evidence to sustain the verdict, and that

constitutes the principal question to which our attention has been invited here.

Ithamar McCarty was the prosecuting witness, and the only witness as to most of the material facts relied on by the prosecuting attorney for a conviction.

He testified, that, late in the evening of August 14th, 1878, he went from Hancock county to the city of Anderson, in the county of Madison, to sell some flax seed for his brother, Jasper N. McCarty; that he received a check for thirty-five dollars and eighty-eight cents, the value of the flax seed, upon a bank of that city; that next morning, after he had received the money on the check, he sat down on the step at a store door, to look over the money and to see that it was all right; that, while so engaged, a man came up in front of him and engaged him in conversation; that this man, who was the person designated in the indictment as the person unknown to the grand jury, and who was referred to upon the trial as the "padlock man," made some inquiry as to his (witness') future business intentions, saying that he had for sale a very remarkable padlock, denominated a burglar-proof padlock, or something of that kind, and suggesting that he, said McCarty, should become an agent for the sale of this padlock; that this unknown man, after some further conversation, left witness to get a specimen lock for his examination and further information; that, after an apparent second effort to find a lock, the padlock man came to witness at an appointed place with a lock; that thereupon he and witness went walking together upon one of the streets, during which time he explained to witness how to unlock this specimen lock, claiming that no person not previously instructed could unlock it; that they soon came to the door of a church, where they sat down upon the step in the shade, and continued the discussion of the merits of the lock; that, soon after they were thus seated, the appellant,

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who was a stranger to witness, came up in front of them and inquired when the train left for Rushville, remarking that his father, who lived in Marion, in Grant county, had had two horses stolen, and that he was in pursuit of the horses; that the padlock man then handed the lock to the appellant, with a remark, that, if his father had had such a lock on his barn as that, his horses would not have been stolen; that the appellant, taking the key, made a seeming effort to unlock the lock, but, failing, said the lock was a sham; that, being assured by the padlock man that it was a very easy thing to do if he only understood its workings, the appellant made another apparent effort to unlock the lock, but, again failing, he handed the lock back, saying he would bet fifty dollars there was not a man in the State who could unlock that lock; that witness pulled out of his pocket three ten-dollar National bank bills, and holding them in his hands, remarked, that, if he were a betting man, he would bet that amount that he could unlock the lock very easily; that at that point witness became suspicious that the padlock man was too anxious for him to bet, and was about to return these bills to his pocket, when the padlock man snatched them from his hand and handed them over to the appellant, who started off on a run; that the padlock man then took witness by the arms and shoved him over the steps in front of the church; that witness, getting loose, ran after appellant, and caught him by the arm and demanded a return of the money; that the padlock man again caught hold of witness, about which time the appellant handed back to witness a ten-dollar bill, requesting him to accept it as a compromise; that witness still hung on to appellant, insisting on a return of the remaining twenty dollars, when another tussle ensued, in which all three engaged, but, the attention of others being attracted by this time, the padlock man very suddenly disappeared from the city, and the appellant was soon afterward arrested.

This we regard as a fair synopsis of so much of the testimony of the prosecuting witness, as is necessary to indicate the character of the transaction for which the appellant was convicted, as above set forth.

The synopsis above given embraces the substantial portions of the testimony which went most strongly against the appellant.

It is said, that the principle of robbery is violence, but it has been held that actual violence is not the only means by which a robbery may be effected; that it may also be accomplished by fear, which the law considers as constructive violence. *Donnelly's Case*, 1 Leach, 229; *Long v. The State*, 12 Ga. 293.

With respect to the degree of actual violence necessary to constitute a robbery, more than a sudden taking or snatching must be shown.

Archbold's Treatise on Criminal Practice and Pleading gives several illustrations in support of this rule, and concludes: "So that the rule appears to be well established, that no sudden taking or snatching of property from a person unawares is sufficient to constitute robbery, unless some injury be done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it." Vol. 2, p. 1290. See, also, 2 Wharton Criminal Law, sec. 1701.

The taking must not precede the violence or putting in fear. In other words, the violence or putting in fear will not make a precedent taking, effected clandestinely or without either violence or putting in fear, amount to a robbery. 2 Russell Crimes, 108; 2 Archb. Crim. Prac. & Plead. 1289.

Applying the well established rules of law thus enunciated to the cause in hearing, it is manifest that a case of robbery was not made out against the appellant, on the



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evidence. *Brennon v. The State*, 25 Ind. 403; *Hart v. The State*, 57 Ind. 102.

The evidence tended to show the fraudulent and felonious obtaining of money from the prosecuting witness by means of a previously arranged trick or contrivance, but did not sustain the charge of robbery contained in the indictment. *Huber v. The State*, 57 Ind. 341.

The judgment is reversed, and the cause remanded for a new trial. The clerk will give the proper notice for the return of the prisoner.

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THE STATE, EX REL. CURTIS, v. HOWE.

**COSTS.**—*Renewal of Action Voluntarily Dismissed.*—*Order Staying Proceedings until Costs are Paid.*—*Mandamus.*—*Presumption.*—A plaintiff who had voluntarily dismissed his action, and withdrawn his complaint, immediately refiled the same complaint, whereupon the court, upon being satisfied that the costs of the first action had not been paid, and that the plaintiff was insolvent, ordered that the proceedings in the second action should be stayed until such costs had been paid.

*Held*, in a proceeding to compel the judge of such court, by mandate, to proceed with the trial of such action, that the order staying proceedings was proper.

*Held*, also, the contrary not being shown, that it is presumed that the second action was vexatiously brought.

From the Marion Superior Court.

*D. V. Burns* and *C. S. Denny*, for appellant.

*C. Baker*, *T. A. Hendricks*, *O. B. Hord* and *A. W. Hendricks*, for appellee.

**WORDEN, J.**—This was an alternative writ of mandate, issued by the Marion Superior Court at general term, in the name of the State of Indiana, upon the relation of Lyman W. Curtis, against the Hon. Daniel W. Howe, one of the judges of that court, the object of which was to require him to proceed with the trial of a certain cause pend-

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ing before him in said court, at special term, in which the relator herein was plaintiff, and one Marcus L. Hare was defendant.

The defendant, Howe, made return to the writ, and such proceedings were thereupon had as that a writ of mandate was refused, and judgment was rendered for the defendant for his costs.

The following facts may be gathered from the petition, writ, return thereto and affidavit filed.

On the 28th day of June, 1877, there was pending in room No. 1 of said court (not before Judge Howe, as we infer), an action wherein said Lyman W. Curtis was plaintiff, and said Marcus L. Hare was defendant, the object of which was to set aside a sheriff's sale of chattels, on account of alleged irregularities in making the same.

On the day last above named, the plaintiff in that action dismissed the same, and judgment was rendered for the defendant for his costs. An execution was afterward issued for the costs, to the sheriff of Marion county, who, finding nothing upon which to levy, returned it unsatisfied.

The costs have not been paid, and the relator is believed to be insolvent.

After the dismissal of said action, the plaintiff therein, on leave obtained, withdrew his complaint therein, and re-filed it, and the defendant therein appeared to the new action, and filed a demurrer to the complaint.

This new action was assigned to room No. two (2), in which Judge Howe presided. Upon the application of the defendant in that action, and upon a showing of the facts, Judge Howe made an order "to stay the proceedings herein, until the plaintiff shall pay the costs in the former proceeding." This new action is the one in which it is sought to compel Judge Howe to proceed, and these are the facts relating thereto.

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Without stopping to consider any question in the cause, other than that arising upon the correctness of the ruling of Judge Howe in making the order to stay proceedings in the action until the costs in the former action should be paid, we may say, that we do not think there was any error in that order; and we are of opinion, therefore, that the court below committed no error in refusing the peremptory mandate, and in rendering judgment in favor of the defendant, for costs.

It is said in Bicknell's Civil Practice, 2d ed., p. 158, that, "Where a second action is vexatiously brought by and between the same parties for the same cause, the court will, by order, stay the proceedings on the second action, until the costs of the former action be paid. 1 Cowp. 322."

The rule is abundantly sustained by the following, among other, authorities: *Weston v. Withers*, 2 T. R. 511; *Henderson v. Griffin*, 5 Pet. 150; *Flemming v. The Pennsylvania Ins. Co.*, 4 Pa. State, 475; *Altman v. Altman*, 12 Pa. State, 246; *Sooy v. M'Kean*, 4 Halst. 86; *Cooper v. Sheppard*, 4 Halst. 96; *Swing v. The Inhabitants, etc.*, 5 Halst. 58; *McIntosh v. Hoben*, 11 Wis. 400; *Cuyler v. Vanderwerk*, 1 Johns. Cas. 247; *Perkins v. Hinman*, 19 Johns. 236; *Ex parte Stone*, 3 Cow. 380; *Kentish v. Tatham*, 6 Hill, 372.

In 2 Wait's Practice, 620, it is said, that "Unless the plaintiff can make it appear that his proceedings have not been vexatious the order to stay being granted in all cases on the presumption that they are so."

As we have seen, the plaintiff voluntarily dismissed his first action, and there was nothing shown to remove the inference that, in doing so, and in commencing another action, he was acting vexatiously. The case falls exactly within that of *Cuyler v. Vanderwerk*, *supra*, in which the court said:

"The plaintiffs having voluntarily suffered a nonsuit

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The State, *ex rel.* Curtis, v. Howe.

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in the first suit, the second is to be deemed vexatious and the defendant is never too late, pending the second suit, before trial, to make his application to stay the proceedings."

The case of *Ex parte Stone*, *supra*, was much like the present. Stone brought an action against Hooker, in the court of common pleas, which was removed to the Supreme Court by *habeas corpus*. The suit thus removed upon *habeas corpus* was not pursued by the plaintiff, but was at an end. Stone then commenced another action against Hooker, in the court of common pleas, for the same cause, and the court made an order to stay the proceedings in the latter action until the costs in the former action should be paid. A motion was made in the Supreme Court for a mandamus commanding the court below to proceed with the trial, notwithstanding the rule. The court said: "The power exercised by the Courts to stay proceedings, till the costs of a former suit for the same cause are paid, does not depend exclusively upon the question whether their collection can be enforced by execution. It is an equitable jurisdiction; and intended to prevent the vexatious multiplication of suits. *Smith v. Barnardiston*, 2 Bl. Rep. 904. Here the plaintiff has voluntarily, and without shewing any excuse, forborne to pursue his action upon the *habeas corpus*. The Common Pleas were right in staying the proceedings." Motion for mandamus denied.

The appellant claims, however, that the order of Judge Howe staying the proceedings until the costs in the former action should be paid was inconsistent with the rulings of this court in the cases of *Cavanaugh v. The Toledo, etc., R. W. Co.*, 49 Ind. 149, *Ammerman v. Gallimore*, 50 Ind. 131, and *Sunman v. Brewin*, 52 Ind. 140.

We, however, are of a different opinion. In neither of the cases cited was there any question involved as to a vexatious multiplicity of suits for the same cause of action.

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The State, *ex rel.* Curtis, v. Howe.

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In the case in 49 Indiana, it was held, that the party seeking relief from a judgment, under the 99th section of the code, might be required, as the condition upon which relief would be granted, to pay the costs occasioned by his default; but that he could not be required to pay them within a limited time, or forego the relief. The case does not appear to us to be at all parallel with that under consideration.

A party is only entitled to relief under the section of the code mentioned, where the judgment against him has been taken "through his mistake, inadvertence, surprise, or excusable neglect;" and, where he shows such a case, there is, perhaps, no good reason for requiring him to pay the costs within a limited time. He has not vexatiously multiplied suits, to the annoyance or injury of his adversary. Besides this, in the case under consideration, there was no order that the costs should be paid within a specified time.

In the case of *Ammerman v. Gallimore*, *supra*, the defendant moved for a new trial, which the court granted on condition that he paid certain costs within thirty days. This court said: "It was proper to require and adjudge, that the appellant pay the costs. But it was not proper to require him to pay the costs within a given time as a condition on which he was to be entitled to a vacation of the judgment and a new trial. The order of the court vacating the judgment and granting a new trial assumes and is based upon the theory that the appellant was entitled to that relief. \* \* \* We are not willing to sanction the proposition that a failure to pay the costs within a given time shall deprive a party of a right, which the law gives to him, to such new trial, at his costs. Such a rule would, in many cases, deprive parties, who are unable to meet such requirements, of their just and legal rights, and operate oppressively upon a class of citizens who are

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Kennard v. Brough *et al.*

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as much entitled to the benefit and protection of the law as those who are able to comply with such conditions.”

This case is no more analogous to the one under consideration than that before noticed.

The case of *Sunman v. Brewin*, *supra*, was like the one last above noticed, and followed it.

There was no hardship in the order made by Judge Howe, and it is fully sustained by the authorities.

The judgment below is affirmed, with costs.

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KENNARD v. BROUGH ET AL.

**FIXTURE.**—*Sale of Land Without Reserving Fixture.*—*Subsequent Purchaser of Fixture.*—*Promissory Note.*—*Failure of Consideration.*—*Breach of Implied Warranty.*—*Evidence.*—*Practice.*—*Pleading.*—*Justice of Peace.*—The owner of a tract of land upon which he had placed a cane mill, let into the ground, to manufacture his cane crop, sold and conveyed the same, without reservation, to a purchaser, and then sold, but did not deliver, the cane mill to a purchaser who executed his promissory note for the purchase price, but the purchaser of the land, on taking possession, refused to allow the purchaser of the mill to remove it.

*Held*, in a suit on the note, originating before a justice of the peace, that the defendant could, without plea, give evidence of either a failure of consideration or of a breach of the implied warranty of title to the mill.

*Held*, also, that the fixture passed with the land, as part thereof, to the grantees.

From the Madison Circuit Court.

*H. D. Thompson*, for appellant.

*C. L. Henry*, for appellees.

**PERKINS, J.**—Suit before a justice of the peace, against Brough and Kuhns, the makers of a promissory note for thirty-five dollars.

Judgment before the justice for the defendants, on the ground of want of consideration for the note.

Appeal to the circuit court.

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Kennard v. Brough *et al.*

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Judgment there, on a trial by the court, for the defendants.

Motion for a new trial overruled; exception, and appeal to this court.

The evidence is in the record.

It is assigned for error, that the judgment below is unsupported by the evidence.

The note was given for a sorghum mill. It was dated March 10th, 1874.

“The mill was fastened onto a log set in the ground; a furnace built of brick, twenty feet long, with a brick chimney six or eight feet high; a shed over the furnace. The furnace was put there to boil the cane juice.”

Before the sale of the sorghum mill to Brough and Kuhns, and the taking of the note for the price of it, including the pans, etc., that were a part of it, Kennard, the payee of the note, had sold the farm on which the mill was situate, as above described, to one Timothy Parsons, without reserving the mill; and, when he sold the mill to Brough and Kuhns, he gave them no notice of the fact of the sale of the farm to Parsons. Brough and Kuhns did not take the mill away at the time of the purchase, on account of the badness of the roads. When they went for the mill, Parsons was in possession of the farm, under his purchase, and claimed the mill as a part of the farm, and refused to permit Brough and Kuhns to remove it.

If the mill was a fixture, as between vendor and vendee, as there was no reservation on the sale of the farm, it passed to the purchaser, became his property, and when, subsequently, Kennard, the vendor, again sold it to Brough and Kuhns, he transferred to them no title, and the note taken for it was without consideration; or, if we regard the implied warranty of title as a consideration, then there was a right of recoupment for damages to the

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Pickerell et al. v. Frankem.

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value of the mill, on the breach of said implied warranty, and the judgment of the court below was right, as, the case having originated before a justice, both defences could be given in evidence under the general denial.

There certainly can be no propriety in our discussing the facts or law in this case. We need only cite the authorities in our own State. *Sparks v. The State Bank*, 7 Blackf. 469, and cases there cited; *Pea v. Pea*, 35 Ind. 387, and cases cited.

It will be noted that this case decides, that, as between vendor and vendee of land on which a mill is situated, as above described, and where the vendor is the sole owner of the land and mill, and there is no reservation or notice to the purchaser of the land, the mill is to be regarded as a fixture, and will pass to the vendee, with the land.

How it might be under other and different circumstances, we decide nothing.

The judgment is affirmed, with costs.

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PICKERELL ET AL. v. FRANKEM.

**PLEADING.**—*Partial Answer Pleaded to Whole Complaint.*—*Promissory Note.*

—*Judgment.*—*Former Recovery.*—In an action against the maker and an endorser of a promissory note payable in bank, one paragraph of the complaint counted upon the note, alleging its endorsement to the plaintiff, while another paragraph counted upon a judgment recovered upon such note, against the maker and plaintiff, by one to whom the note had been endorsed by the plaintiff, and who had assigned the judgment to the plaintiff. The defendants, for answer to the whole complaint, pleaded such former recovery upon the note.

*Held*, on demurrer, that such answer, though sufficient as to the first, was insufficient as to the second paragraph of the complaint, and therefore that the demurrer was properly sustained.

**SUPREME COURT.**—*Record.*—*New Trial.*—*Evidence.*—Where the evidence is not in the record, the Supreme Court can not consider a motion for a new trial, based upon matters relating solely to the evidence.

From the Marion Circuit Court.



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*Pickerell et al. v. Frankem.*

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*W. P. Adkinson*, for appellants.

NIBLACK, J.—Isaac L. Frankem sued Samuel J. Pickerell, James P. Wright and John M. McCahan before a justice of the peace, but with what result the record does not inform us, as the transcript which the justice filed in the circuit court is not in the record. Owing, also, to the absence of this transcript from the record, it is not shown by what means or upon whose agency the cause was brought to the circuit court.

After the cause reached the circuit court, the plaintiff filed an amended complaint, in two paragraphs.

The first paragraph alleged, that, on the 11th day of September, 1874, the defendant Pickerell executed to his co-defendant Wright his promissory note for fifty dollars, due ninety days after date, and negotiable and payable at the First National Bank of Indianapolis, with ten per cent. interest, filing a copy of the note, and that afterward the said Wright had endorsed said note to the other defendant, McCahan, who had endorsed the same to the plaintiff, such note remaining still unpaid.

The second paragraph alleged the execution of a note, by Pickerell to Wright, for fifty dollars, negotiable and payable at the First National Bank of Indianapolis, as in the first paragraph, the endorsement of such note by Wright to McCahan, the endorsement by McCahan to the plaintiff, and by the plaintiff to Thomas J. Cottrell & Co.; also the recovery of a judgment upon said note by Cottrell & Co., on the 11th day of January, 1875, against Pickerell and the plaintiff, for the amount due upon it, the issuance of an execution upon such judgment, in consequence whereof the plaintiff was compelled to pay and did pay said judgment, and the failure of the defendants to repay to the plaintiff the amount so paid by him to satisfy said judgment.

An answer consisting of five paragraphs was filed to the whole complaint.

The first paragraph was the general denial, by all the defendants:

The second paragraph was a plea of payment, by all the defendants.

The third paragraph set up, on behalf of the defendants Wright and McCahan, the recovery of a judgment by Cottrell & Co., before a justice of the peace, upon the note in suit, against Pickerell and the plaintiff, the entry of replevin bail on said judgment by one Joseph Stumph, and the ability of both Pickerell and Stumph to have paid the judgment, by reason of which the payment of the same by the plaintiff was both voluntary and unnecessary.

The fourth paragraph was the separate answer of Pickerell, and set up on his behalf substantially the same facts contained in the third paragraph, constituting, as we construe it, what might be termed an informal plea of a former recovery.

The fifth paragraph was a plea of former recovery, by all the defendants, alleging the recovery of a judgment by Cottrell & Co., upon the note described in the complaint, against Pickerell and the plaintiff, as set out in the third paragraph.

A demurrer was sustained to the fourth and fifth paragraphs of the answer.

The plaintiff thereupon dismissed the action as to the defendants Wright and McCahan, and, issues being joined, the cause was submitted to the court for trial.

The court found that there was due the plaintiff the sum of sixty-eight dollars and eighty-three cents, and rendered judgment against the defendant Pickerell for that sum.

The appellants have assigned for error the sustaining of the demurrer to the fourth and fifth paragraphs of the answer.

The facts set up in both of those paragraphs, conceding them to have been well pleaded, did not, as to either of

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Carr v. Brady.

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them, constitute a defence to the second paragraph of the complaint, which alleged a recovery upon the note and a payment of the judgment by the plaintiff; and, as those paragraphs assumed to answer the whole complaint, but did not answer all of it, they were bad on demurrer. 1 Chitty Pleading, 16th Am. ed., p. 523; *Jackson v. Fosbender*, 45 Ind. 305; *Richardson v. Hickman*, 22 Ind. 244; *McDougle v. Gates*, 21 Ind. 65; *Louis' Adm'r v. Arford*, 21 Ind. 235; *Free v. Haworth*, 19 Ind. 404; *Conwell v. Finnell*, 11 Ind. 527; *Webb v. Deitch*, 17 Ind. 521.

The defendant Pickerell, at the proper time, interposed a motion for a new trial, but his motion was overruled, and the appellants have also assigned for error the decision of the court upon that motion.

The evidence, however, is not in the record, and it was only upon matters arising upon the evidence that legitimate causes for a new trial were assigned. Under such circumstances, we must presume that a new trial was correctly refused.

Other questions are discussed by counsel for the appellants, but they are not reserved in such a way as to be available here.

The judgment is affirmed, at the costs of the appellants.

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CARR v. BRADY.

DOWER.—*Lands Sold on Execution Prior to May 14th, 1852.*—*Rights of Widow in.*—Tenancies by the courtesy and in dower were abolished by section 16 of the act of May 14th, 1852, "regulating descents," etc., 1 R. S. 1876, p. 408; and therefore the widow of one dying subsequent to the taking effect of that act has no right of dower in real estate belonging to, and sold on execution against, him prior to its taking effect and during the existence of the marriage relation.

From the Marion Superior Court.

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Carr v. Brady.

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*H. W. Harrington*, for appellant.

WORDEN, J.—Complaint by the appellant, against the appellee, for the assignment of dower.

Demurrer to the complaint, for want of sufficient facts, sustained. Exception, and judgment for the defendant.

Judgment affirmed, on appeal to general term.

The facts alleged in the complaint are, briefly stated, that the appellant is the widow of Patrick Carr, to whom she was married in the year 1846, and who died in the year 1875. In the year 1849, her deceased husband was seized in fee of certain land described, situate in Marion county; and, in the year 1851, the land was sold on an execution against him, whereby his title was divested, and became vested in the purchaser, Henry Brady. Since the death of her husband the plaintiff has demanded an assignment of dower, which has been refused.

The act of May 14th, 1852, abolished tenancies by the courtesy and in dower. 1 R. S. 1876, p. 411, sec. 16.

As the plaintiff's right to dower in the land was but an inchoate right at the time of the taking effect of the act above cited, and had not become consummate by the death of her husband, it was in the power of the Legislature to take it away altogether.

This the Legislature did; and the plaintiff, on the facts stated, is not entitled to dower in the premises. The cases establishing this proposition are numerous, and no attempt will be made to collect them all here.

The first exactly in point, we believe, is that of *Strong v. Clem*, 12 Ind. 37; and the last to which our attention has been called is that of *Taylor v. Sample*, 51 Ind. 423.

Many of the previous cases are collected in *Bowen v. Preston*, 48 Ind. 367.

We are asked to overrule these decisions, and to hold that it was not in the power of the Legislature to abolish an inchoate right of dower. We shall enter upon no dis-

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Spitznogle v. Ward.

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cussion of the question as an open one. The proposition established by the decisions referred to has long since become a rule of property, which ought not, by any judicial action, to be disturbed. See observations on this point, in *Harrow v. Myers*, 29 Ind. 469, and in *Bowen v. Preston*, *supra*.

We do not wish to be understood, by any thing herein said, as questioning or doubting the correctness of the ruling in *Strong v. Clem*, *supra*, and the cases following it.

The judgment below is affirmed, with costs.

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SPITZNOGLE v. WARD.

**SUPERVISOR.**—*Repairing Highway. — Overflowing Adjacent Land.—Remedy of Owner.—Trespass.*—Where a supervisor, in good faith and in the proper discharge of his duties, overflows adjoining lands, the remedy of the owner is by petition to the township trustee for damages, and not by an action against the supervisor personally.

From the Cass Circuit Court.

*F. S. Crockett*, for appellant.

*J. M. Howard*, for appellee.

**BIDDLE, J.**—Complaint by the appellee, against the appellant, averring that he wrongfully cut a ditch into and upon the land of the appellee, under his fence, and cast a stream of water into his field, upon his growing crop of corn.

The case was commenced before a justice of the peace, and came into the circuit court by appeal.

Trial by the court; finding for the appellee.

Judgment over a motion for a new trial, and exceptions.

Appeal, and assignment of errors.

The evidence shows that the appellee was the owner of the land as coparcener with another person; that the field alleged to have been injured by the ditch was situated adjoining a public highway; that the appellant was the supervisor of the road district in which the highway was situated; and that the ditch complained of was cut by the appellant, as supervisor, in the regular course of doing work upon the public highway.

There is no evidence tending to show that the appellant, in cutting the ditch, acted improperly or in bad faith. In such cases the law provides a remedy for the aggrieved party, by a petition to the township trustee for an assessment of damages occasioned by the injury, and the supervisor is not personally liable. 1 R. 'S. 1876, p. 858, sec. 16.

This question has recently received the full consideration of this court, in the case of *McOsker v. Burrell*, 55 Ind. 425. We need not, therefore, any further consider the case.

The judgment is reversed, at the costs of the appellee, and the cause remanded with instructions to sustain the motion for a new trial, and for further proceedings.

Petition for a rehearing overruled.

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133	475

#### KENNARD v. CARTER ET AL.

**JUDGMENT.—Discharge of Joint Maker of Promissory Note by Judgment Against Co-Maker.**—A separate judgment against one of several joint makers of a promissory note, rendered in an action to which the other makers were not parties, or in which steps were not taken to preserve the right to a subsequent judgment against them, is a bar to a subsequent action thereon against them.

**SAME.—Modes of Obtaining Judgments.—Justice of the Peace.**—Judgments may be rendered, either in the circuit court or by a justice of the peace, in

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either of three modes, viz. : 1. In an action commenced by process ; 2. In an action commenced by agreement ; or, 3. By confession without an action.

**SAME.**—*Judgment by Confession Without Affidavit.*—A judgment by confession is valid between the parties thereto, though rendered without any, or upon an insufficient, affidavit.

**SAME.**—*Consent of Plaintiff.—Presumption.*—A judgment by confession can not be rendered without the consent of the plaintiff ; but that consent may, where the contrary does not appear, be presumed from the record.

**SAME.**—*Refusal to Consent.*—The refusal of the plaintiff to consent to such a judgment may be replied by him to an answer setting up such judgment.

**SAME.**—*Informality of Judgment.*—A judgment is not rendered void by mere informality in its terms.

**SAME.**—*Judgment of Justice, How Proved.—Evidence.*—The proceedings and judgment of a justice of the peace may be proved by either the original or a duly certified copy thereof.

From the Madison Circuit Court.

*H. D. Thompson*, for appellant.

*C. L. Henry*, for appellees.

**PERKINS, J.**—Suit upon a note, of which the following is a copy :

“Twelve months after date, we promise to pay to the order of Jacob Kennard two hundred dollars, with five per cent. attorney’s fees, if suit be instituted on this note, value received, without any relief whatever from valuation or appraisement laws, with interest at the rate of ten per cent. per annum. The drawers and endorsers severally waive presentment for payment, protest and notice of protest for non-payment of this note.

“W. S. CARTER,

“T. A. BAKER,

“WILLIAM SILVER.”

Baker and Silver answered :

1. Payment.
2. That the note sued on was the joint note of all the defendants ; that, on the 21st day of February, 1874, said Baker paid twenty dollars on said note ; that, on the 13th

day of April, 1874, he paid one hundred dollars on said note; and, on the 11th day of August, 1874, he paid ten dollars and forty-five cents thereon; on the 27th day of August, 1874, the plaintiff, Kennard, instituted suit on said note before Erastus O. Chapman, a justice of the peace of Fall Creek township, Madison county, Indiana, against the defendant Wesley S. Carter, and on the 29th day of August, 1874, recovered a judgment in said suit, before said justice, against said Carter, by confession, for the sum of ninety-six dollars and eight cents, the full amount due on said note, a copy of which judgment is filed herewith, marked "Exhibit A," which judgment remains unappealed from; and they aver, that, at the time of the commencement of the suit before said justice, and at the time of the rendition of said judgment, said Wesley S. Carter and said Theodore A. Baker and William Silver were all residents of said Fall Creek township, in said county; that no summons was ever issued in said suit for either said Silver or Baker. Wherefore they say said plaintiff ought not to maintain this suit, etc.

3. That, on the 29th day of August, 1874, the plaintiff recovered a judgment on said note, for the full amount thereof, before Erastus O. Chapman, a justice of the peace of Fall Creek township, county of Madison, Indiana, against the defendant Wesley S. Carter, a copy of which judgment is filed herewith, marked "Exhibit A;" that, on the 6th day of March, 1875, an execution was issued on said judgment and placed in the hands of John H. Hicks, constable of said township; that, on the 9th day of August, 1875, said Hicks, as such constable, held said execution in his hands, as he then also held several others against said Wesley S. Carter, and, as such constable, collected of said Wesley S. Carter the sum of one hundred and fifty dollars, being more than the amount of said execution, interest and costs in favor of the plaintiff, Kennard, as aforesaid;



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that said execution in favor of said plaintiff was the oldest execution in the hands of said constable against said Carter, and, as such, was entitled to be paid out of said money, but that the plaintiff then ordered said constable to return said execution without such payment, and it was accordingly done. Wherefore, etc.

Demurrers to the paragraphs of answer were overruled.

Reply in denial. Trial by the court. Judgment for defendants Baker and Silver, Carter not being a party to the suit.

Motion for a new trial overruled.

The grounds of the motion were:

1. Error of the court "in permitting the defendants to read in evidence, on the trial, the transcript of the judgment of Justice Chapman," referred to in the answer; and,
2. The finding and judgment of the court are not sustained by the evidence, are contrary to the evidence, and should have been for the plaintiff.

The errors assigned in this court are:

1. Error in overruling the demurrers to the several paragraphs of answer; and,
2. In overruling the motion for a new trial.

The evidence given on the trial was as follows:

1. The plaintiff introduced the note set out in the complaint, and copied into this opinion.
2. The defendant Baker testified thus:

"I am one of the defendants in this cause. I made payments to the amount of \$135, all of which are credited on the note. Wesley S. Carter and I were partners in the drug business. Our partnership commenced on August 14th, 1872, and was dissolved in May, 1873. These payments were made after the partnership was dissolved."

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Over the objection of the plaintiff, the defendants then read in evidence the following transcript:

“ Jacob Kennard	} Complaint for ninety-six dollars and sixty cents.
“ Wesley S. Carter,	
“ Theo. A. Baker,	
“ William Silver.	

“ August 27th, 1874, plaintiff files the following cause of action.”

(Here follows a copy of the note copied at the commencement of this opinion, with the credits on it.)

“ ‘August 29th. I, Wesley S. Carter, acknowledge myself justly indebted to the plaintiff in the sum of ninety-six dollars and eight cents, and that he does not confess judgment to defraud his creditors. W. S. CARTER.’ ”

“ August 31st. I, Stephenson Hair, acknowledge myself replevin bail for the stay of execution on the following judgment for 180 days from the rendition thereof.

“ Attest: E. O. CHAPMAN, J. P. S. HAIR.

“ Judgment is therefore rendered against said defendant, by confession, for ninety-six dollars and ten cents, without relief, together with the costs of this suit and the costs and interest that may accrue from this rendition.

“ August 29th, 1874. E. O. CHAPMAN, J. P.

“ Execution to John Hicks, March 6th, 1875. Execution returned August 9th, by order of plaintiff. 55 cents. September 7th, 1875; execution to J. Hicks. Execution returned February 7th, 1874.

“ I, E. O. Chapman, certify that the foregoing is a true copy of the proceedings and judgment in the above case, as taken from my docket. E. O. CHAPMAN, J. P. [SEAL.]”

“ To the reading of which in evidence, the plaintiff at the time objected, because the original entry of judgment, as made at the time by the said justice in his docket, and the docket itself containing the same, was then in court, and offered by the plaintiff at the time to the court, and

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which was the best evidence; because the said transcript was not a transcript of a legally rendered judgment, because the same did not show that a suit or action had ever been commenced before the justice, nor that process had ever been issued or served on the defendants in said cause, nor that the suit was commenced by agreement of the parties, nor that the defendants appeared; and, further, because the justice had no jurisdiction to render judgment against the defendants not served nor appearing, and because of vagueness and uncertainty in the so-called judgment, but the objections were overruled, and exceptions taken at the time."

Jacob Kennard then testified:

"I am the plaintiff in this suit; I did not see Wesley S. Carter at my house, in August or September, 1875; I saw him two miles west of Newcastle, in August, 1875; no one was with him; he paid me nothing; he wanted me to give him time on that note; said he would give me fifteen per cent. interest; he wanted a year; he did not say any thing about a judgment; he said note; I told him I would not do it, I wanted the money; he said nothing about Mr. Hicks; I received a telegram from Wesley S. Carter afterward; I answered by telegram; I supposed it was answered to Mr. Carter; do not think I sent it to Esq. Chapman; I never sent but the one telegram; don't know where that is; think I gave it to Mr. Thompson; it was a copy I gave him; don't know where the original is; I never saw it; I told my son what to telegraph, and he did it; I got a copy and think I gave it to Mr. Thompson."

John H. Hicks testified:

"In August and September, 1875, I was acting as constable of Fall Creek township, Madison county, Indiana; had an execution in favor of Jacob Kennard, against Wesley S. Carter, in my hands, for about \$100, issued by E. O. Chapman, Justice; I had about \$175 paid me by Mr. Carter; Kennard's was the oldest execution I had against

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Carter; Mr. Carter paid me in money \$175, while I had that execution; it was for about \$100; I had the execution a month or six weeks before Carter left that time, being about the 1st of September, 1875; the \$175 paid me by Carter was paid on no particular execution; he told me to give him credit on the executions; had several in my hands; don't know on which I credited the money."

Erastus O. Chapman testified:

"I made the endorsement of the filing on this note, to wit: 'Filed August 25th, 1874. Kennard v. Carter and Baker; note.' Don't know whether it is the 27th or 28th; rather think it is 27th; Jacob Kennard filed the note with me, plaintiff in this case; this is the same note the judgment read in evidence was rendered upon; Mr. Kennard got the note from me on Feb. 1st, 1876; there was but one such judgment on my docket, of Kennard v. Carter."

This was all the evidence in the cause.

The same question arises upon the rulings on the demurrers severally to the paragraphs of answer, and the motion for a new trial. We shall consider and decide the question as applicable to all those rulings; that question is: Was the judgment against Wesley S. Carter, rendered by Erastus O. Chapman, on the 29th of August, 1874, a valid judgment? The note in question in this case was the joint note of Carter, Baker and Silver.

The law is well settled, that a separate judgment taken against one of several joint makers of a note, in a suit to which the others are not parties, or in which steps are not taken to preserve the right to a subsequent judgment against such others, may be pleaded as a bar to a subsequent suit against those not included in the first suit or judgment. *Erwin v. Scotten*, 40 Ind. 389, and cases cited; *Holman v. Langtree*, 40 Ind. 349; *Taylor v. Claypool*, 5 Blackf. 557; *Nicklaus v. Roach*, 3 Ind. 78; *Crosby v. Jeroloman*, 37 Ind. 264; *Lingenfelser v. Simon*, 49 Ind. 82.

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In this case, it is said by counsel for the appellant, that the affidavit denying fraud in the judgment rendered by said justice was not properly prepared and verified, and that the entry of replevin bail was irregular. But these points are immaterial in this case, because they do not affect the validity of the judgment against Carter, as between him and the appellant. As between them, the judgment was valid without an affidavit that it was not fraudulently confessed, and without entry of replevin bail. It was the judgment against one of the makers of the joint note (that judgment being valid) that merged the note as a cause of action, as against all the makers. See the authorities above cited.

Counsel for appellant insists that the judgment rendered by Justice Chapman was a nullity, void for want of jurisdiction in the justice. Starting with the fundamental proposition, that the justice's court is one of limited, statutory jurisdiction, he says: "The duties of a justice of the peace as to the commencement of a suit are clearly marked out. 'Suits may be instituted before justices by agreement or process.' 2 R. S. 1876, p. 609, sec. 20. The statute provides no other way. The same section says that 'the delivery of the process to the officer authorized to serve the same, if by process, and the entry of the fact upon the docket, if by agreement, shall be deemed such commencement.' The docket must show the suit to have been commenced in pursuance of that statute." Counsel further contends that, in this case, the suit was not only not commenced by agreement, but was commenced without the consent of the appellant, plaintiff below.

We may remark at this point, that counsel is not entirely accurate in his statement that section 20, above cited, is the only provision as to the mode of instituting suits and obtaining judgments. In the code of practice, three modes are pointed out:

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1. By process. Section 34.
2. By agreement. Section 386.
3. By confession of judgment, "without action" [suit].  
Section 383.

The first two contemplate trials; the third does not.

The same three modes are mentioned in the justices' act: Those by process and agreement, in section 20, *supra*; and, in section 59, of the same act, it is provided, that "Judgments may be rendered by confession, and no appeal shall lie therefrom," etc.

The case of *Barnett v. Juday*, 38 Ind. 86, is decided upon the theory that the above section 59 is to be construed in connection with section 383 of the code of practice, which provides that judgment by confession, under those sections, must be by consent of the plaintiff. In this view we concur. And that case, which, in its facts, is like the case at bar, decides that consent may be presumed on such facts. It was contended in that case, as it is in this, that the judgment confessed was a nullity, for the want of consent on the part of the plaintiff. But the court said:

"We think that, *prima facie*, at least, the judgment must be regarded as having been taken by the consent or procurement of the appellee" (the plaintiff below). "It is alleged in each paragraph that the judgment was recovered by the plaintiff therein; and as he must be presumed to have had the possession and control of the cause of action, we think it is reasonable to infer that the judgment was rendered by his consent. If, in fact, this was not so, we presume he may reply that fact." *Haggerty v. Juday*, 58 Ind. 154.

In the case at bar, there was an additional fact, the appellee, plaintiff below, was a witness upon the trial in the circuit court, and did not deny consent.

The judgment before the justice was not void for uncer-

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Kennard v. Carter *et al.*

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tainty. It was informal; there may have been clerical errors committed in entering it; but it was, in legal effect, a judgment against Wesley S. Carter alone. It was not void for informality. *Downard v. Sluder*, 5 Blackf. 559; *Wilcox v. Ratliff*, 5 Blackf. 561; *Brewer v. Murray*, 7 Blackf. 567.

It is unnecessary for us to notice the question attempted to be raised by the third paragraph of answer, viz., the effect of negligence in the proceedings to collect the judgment against Carter, rendered by Justice Chapman. That judgment, being valid whether collected or not, was a bar to this suit. The constable may have rendered himself liable. There were no sureties in the case. But on these points we decide nothing.

One other point we must notice briefly, viz., the admission of a transcript of the judgment of said justice in evidence. The court did not err in admitting it. The code of practice enacts:

"SEC. 280. Copies of the proceedings and judgments of any justice of the peace of this State, certified under his hand and seal, or under the hand and seal of the justice who may have the legal custody thereof, as true and complete copies of such proceedings or judgments, shall be received as evidence in the several courts in this State."

This section does not make copies the exclusive evidence of the proceedings of justices, but it makes them evidence equally with the original records of such proceedings. Either may be used as evidence. *Green v. The City of Indianapolis*, 25 Ind. 490; *The City of Logansport v. Crockett*, *post*, p. 319.

The judgment is affirmed, with costs.

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Wilson v. Tucker.

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## WILSON v. TUCKER.

**PROMISSORY NOTE.—Want of Consideration.**—A promissory note was executed by the maker, for the amount of the debt of another, at the request of the creditor but without the knowledge or consent of the debtor, and afterward, on the death of the payee, at the request of a third person, the maker took up said note and executed, instead thereof, to such person and another, severally, other promissory notes for the amount of the principal and interest of the first.

*Held*, in an action on one of such notes, that it was given without consideration. BIDDLE, J., dissented.

From the Shelby Circuit Court.

*J. B. McFadden*, for appellant.

*O. J. Glessner*, *E. S. Stilwell* and *T. J. Woollen*, for appellee.

BIDDLE, J.—Complaint on a promissory note made by the appellant to the appellee.

Answer, that the note was executed without consideration.

Trial by the court: finding for the appellee. Judgment.

By a motion for a new trial, the appellant has presented the case to us upon the sufficiency of the evidence, which is the sole question in the case.

The execution of the note, not being denied, was admitted by the pleadings.

The only evidence for the defence was the testimony of the appellant, which is as follows:

“In the fall of 1869, I was at the residence of James Hays, and as I was leaving to go home, he requested me to call at the residence of Joseph Tucker, and tell Mr. Tucker that if he would have his hogs at Joshua Shipp’s scales, on a certain day, which he then named, he would pay him a certain price for them. I think the price he named was ten dollars per hundred. When I got to Mr. Tucker’s house I delivered the message to him, exactly as I was requested to by Mr. Hays. After I had delivered the message, Mr. Tucker asked me if I would be there to



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Wilson v. Tucker.

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receive and weigh the hogs. I told him that I would not; that I had no interest in the matter; that I was only delivering the message to him as Mr. Hays had requested me to do. Mr. Tucker did not say whether he would take his hogs to Shipp's or not. This was all the conversation I had with Mr. Tucker in regard to the matter, at that time. I never had any conversation with Mr. Tucker about the matter after that time, until some time in May following, when Mr. Tucker called at my house and told me that he had delivered the hogs at Shipp's scales, and had never got any thing to show that he had done so, and said he wanted something to show that he had delivered them. He said he wanted the money, a note, or something else. I then gave him my note for the amount he said the hogs came to. There was no consideration whatever for the note to Joseph Tucker, except what I have stated. After the death of Joseph Tucker, the plaintiff, Dennis Tucker, came to see me about the note. He had it with him, and at his request I took it up, and executed two other notes in its stead. We first calculated the interest on the old note. I then took up the old note, and gave the note in suit and another note for the balance. At the request of the plaintiff the other note was made payable to Joseph Cutsing. There was no other consideration for the note in suit than what I have already stated. I was not a partner of Hays, at the time; I did not buy the hogs on my own account; I did not buy them as the agent of Hays; I did not buy the hogs at all."

The note not being denied, the onus of the defence lay upon the appellant. The majority of the court hold that the evidence establishes the defence. The writer of this opinion thinks otherwise and dissents.

The judgment is reversed, at the costs of the appellee, and cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

Petition for a rehearing overruled.

Shepherd v. The State.

SHEPHERD v. THE STATE.

**CRIMINAL LAW.—Arrest of Judgment.—Causes for.**—A motion in arrest of judgment lies only for two causes, viz. : 1. That the grand jury had no legal authority to present the indictment, for want of jurisdiction in the court ; or, 2. That the facts stated do not constitute a public offence.

**SAME.—Misconduct of Counsel.—Reference to Former Trial.—Evidence.**—A statement, that, on a former trial, the defendant had been convicted, made in the hearing of the jury, by the prosecuting attorney, to opposing counsel, in reply to a remark by the latter calculated to elicit such remark, and remarks of the same character, made by a witness in the course of his examination, in fixing certain dates, are not sufficient causes for reversing the judgment.

**SAME.—Murder.—Verdict upon Circumstantial Evidence.—Supreme Court.**—Where a murder has been committed, and, after a fair trial, on a sufficient indictment, under a proper presentation of the law by the court, and upon a chain of evidence which, though wholly circumstantial, clearly points to the defendant as the murderer, the jury trying the cause find the defendant guilty as charged in the indictment and affix a lawful penalty, the Supreme Court will not disturb the verdict.

From the Sullivan Circuit Court.

*S. Coulson, G. W. Buff and J. F. Hays*, for appellant.

*T. W. Woollen*, Attorney General, *J. E. Lamb*, Prosecuting Attorney, and *T. J. Wolf*, for the State.

**BIDDLE, J.**—The appellant was indicted for murder, in the following words :

“The grand jurors of Sullivan county, in the State of Indiana, good and lawful men, duly and legally empanelled, charged and sworn to enquire into felonies and certain misdemeanors in and for the body of said county of Sullivan, in the name and by the authority of the State of Indiana, on their oath present, that one Thomas Shepherd, late of said county, on the 10th day of June, A. D. 1875, at said county and State aforesaid, did then and there unlawfully, feloniously, purposely and with premeditated malice, kill and murder one Mason Engle. by then and there feloniously, purposely and with premeditated

64	43
137	410
64	43
136	524
136	237
64	43
141	111

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Shepherd v. The State.

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malice, shooting at and against, and thereby mortally wounding, the said Mason Engle, with a certain deadly weapon commonly called a revolver, then and there loaded with gunpowder and leaden ball, which said revolver he, the said Thomas Shepherd, then and there had and held in his hands, of which said mortal wound he, the said Mason Engle, then and there instantly died, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Indiana.”

The appellant moved to quash the indictment. His motion was overruled, and he excepted.

Plea, not guilty; trial by jury; verdict, guilty; punishment, imprisonment during life.

Motion for a new trial; overruled; exceptions.

Motion in arrest of judgment; overruled; exceptions; judgment on the verdict.

An appeal to this court was prayed and granted, and the appellant allowed sixty days to prepare and file his bill of exceptions.

The errors assigned in this court are:

1. Overruling the motion to quash the indictment;
2. Overruling the motion for a new trial;
3. Overruling the motion in arrest of judgment.

We do not think the court erred in overruling the motion to quash the indictment. It is well drawn and sufficient in every particular. Indeed, the counsel for appellant do not debate the question in their brief.

The next question we will consider is, overruling the motion in arrest of judgment. This motion lies for two causes only:

1. That the grand jury had no legal authority to present the indictment, for want of jurisdiction in the court; and,
2. That the facts stated do not constitute a public of-

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Shepherd v. The State.

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fence. 2 R. S. 1876, p. 409, sec. 144; *Mullen v. The State*, 50 Ind. 169; *Greenley v. The State*, 60 Ind. 141.

Neither of these causes exists in the case before us.

The appellant complains of the conduct of the prosecuting attorney during the trial. It appears that an attachment had been issued against a witness, Mary Thompson, who was not in attendance, concerning whose absence "the counsel for defendant remarked, that the reason the said Mary Thompson was not here as a witness on this trial was because the prosecuting attorney had 30 abused her on the other trial. Whereupon the prosecuting attorney remarked to the counsel for defendant, in the presence of the jury, that the jury had convicted the defendant and sent him to the penitentiary on that other trial."

The above remark of the counsel for appellant, in alluding to the conduct of the prosecuting attorney and "the other trial," was as unwarrantable as the remark of the prosecuting attorney, which it called out, and has the disadvantage of being the first breach of courtesy. It were better that neither remark had been made, but, taken together, they do not furnish any ground for reversing the judgment.

In several places throughout the evidence, under the examination of witnesses by the counsel of both sides, the witnesses made statements about "the other trial" and the appellant's return "from Jeffersonville," which were a part of the *res gestæ*, fixing dates and statements, to which no objections were made by the counsel for either side, and which were not improper. Evidence from the witnesses had been called out on both sides, referring to "the other trial," and its results, as plainly as did the above remarks of either counsel. There was no error in this evidence on either side. The remark complained of was not made in the course of argument; it was aside from the trial, and both remarks amounted to no more than a pass at words

between the counsel; and we think, that if one breach of courtesy could be justified by another, the prosecuting attorney was not at fault.

The remaining questions arise under the motion for a new trial. We will examine such as are properly presented by the record and debated in the brief of appellant.

The instructions to the jury asked by the appellant, and refused by the court, are properly reserved. None of the instructions given by the court, and excepted to by the appellant, are reserved by a bill of exceptions, but all except numbers one and three, which are not signed by the judge as required by the statute, seem to be well presented. The instructions asked for by the appellant, and refused by the court because they were given in substance on the court's own motion, and those refused and given in a modified form, are so numerous and long, that it is impracticable to set them out, with their substitutes and modifications, in this opinion, but they have been carefully considered in full consultation, and we are of opinion that there is no error in them. They seem to us full and fair, to the very verge of the law in favor of the appellant. The same may be said with regard to the instructions given by the court on its own motion, and excepted to by the appellant. They seem to us to present the law of the case fully, carefully and justly towards the State and towards the defendant. No error was committed, in our opinion, either in giving or refusing to give instructions to the jury.

But a more difficult question presents itself in the case, upon the character of the evidence as being sufficient to support the verdict; indeed, it seems to us that this is the only question which affords open ground for doubt or debate, and the one upon which the counsel for appellant have spent far more force and earnestness than upon any other question before us.

Mason Engle was killed upon the 10th day of June, 1875. He was shot in the night-time, through an open window pane, by some person standing outside of his house, with a pistol, or some kind of fire-arms, with a leaden ball which passed through his arm, entered his side, pierced the diaphragm, wounded the liver and kidneys, and lodged near the opposite side of his body, of which wound he died. It is clear, therefore, beyond any reasonable doubt, that Mason Engle is dead, that he was killed.

The question then is: Did the appellant commit the crime, as charged in the indictment? The evidence is wholly circumstantial, and is so voluminous and minute in many of its details, as to render it impracticable to set it out at length. But, upon careful reading and full consideration, we believe it proves the following facts, beyond a reasonable doubt: That, for some time before the killing, there had been a feud between the appellant and the deceased, somehow connected with the deceased's wife; that, a short time before the killing, probably about a month, the appellant went to the house of the deceased in his absence, upon an errand, or pretended errand, to his wife. The wife told him that her husband would soon return, and that he had better not remain, as she feared there might be a *fuss*. He expressed no fears, and said he thought there would be no trouble. The husband soon returned home, and immediately accosted the appellant in rough language. Angry words at once sprang up between them, which led to a long and brutal fight, in which the deceased was badly beaten and greatly disabled. The wife, after the fight, went away with the appellant, to her father's house, in the neighborhood. After the fight, the appellant remarked, that he would have her divorced within fifty days. It appears, however, that the wife had returned to her husband, and they had resumed their marital relations, before the killing took place. She was present

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Shepherd v. The State.

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in the house with a lighted lamp, and was about retiring to bed, at the time her husband was killed.

The appellant lived about five miles from the residence of the deceased. A man by the name of Whitworth resided with him. Whitworth owned a horse that was kept on the premises of the appellant, which seems to have been used by both Whitworth and appellant as they chose. On the day before the killing, the horse had been shod by a blacksmith in the neighborhood with peculiar, small shoes, such as were not used in that part of the country. The appellant about the same time wore a pair of new boots, with large, well-defined heels.

The next day after the killing of Engle, the trail of a horse was tracked from near the residence of the appellant, across several fields, in the direction of the house of the deceased. The fences had been let down to pass through. From the tracks of the horse, he had evidently been ridden upon the run, and the impression of his feet in the earth corresponded in size and appearance with the shoes put upon Whitworth's horse the day before Engle was killed. Where the fences were let down to cross the fields, boot or shoe tracks were discovered, resembling such as would have been made by the boots which the appellant wore about that time. The horse tracks were traced to within a short distance, probably a half a mile, from the residence of the deceased, where the horse had been tied in a thicket of bushes. Immediately under the window through which the deceased was shot, tracks made by either boots or shoes were found, which resembled the tracks made at the several places where the horse had been taken through the fence gaps in crossing the fields. The horse tracks were traced back from where the horse was hitched, to within a short distance of the appellant's house.

The appellant was at his home the day before and the morning after the killing, but where he was during the

night of the killing does not appear, either in the evidence for the State or for the appellant, unless it was he who rode the horse that night.

On the next day after, and on several times subsequent to, the killing, when the subject was spoken of to, or in the presence of, the appellant, he said, "Somebody has killed Engle on my credit," or similar words.

Soon after the killing, several citizens undertook to arrest the appellant for the crime. He resisted them with a revolver, and a shooting affray occurred, in which some persons were slightly shot.

When the appellant was arrested by the sheriff, he at first denied that his name was Shepherd, but soon afterwards admitted that he was Thomas Shepherd. Some time before that time he had called himself by another name, and pretended to be or was a doctor engaged in manufacturing and selling patent medicines.

After his arrest, fire-arms and other weapons, and a mask made of muslin, were found among his effects.

It does not appear what became of Whitworth.

There are various other facts, of little or no direct weight either way in the evidence, too numerous and minute, and not of sufficient importance, to make their statement necessary to a fair view of the case.

We think that the above facts prove, beyond a reasonable doubt, that some person rode a horse, upon the night that Engle was killed, from near the residence of the appellant, to a point near the residence of the deceased, and that that person was the murderer of Mason Engle. Was that person the appellant? This is the difficult and decisive question in the case. The jury, upon the evidence, under proper instructions as to the law, have declared that he was. We can not, under any judicial rule known to us, disturb the verdict.

The judgment is affirmed, at the costs of the appellant.



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Fly v. Brooks.

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## FLY v. BROOKS.

**MISTAKE.—Conveyance by Quitclaim.—Reformation of Deed.—Partition.—Complaint.—Uncertainty.—Demurrer.**—A complaint alleged, that, on a certain day, about five years prior to the bringing of the action, the plaintiff was the owner of the undivided one-fifth part of certain lands; that, at that time, the plaintiff and defendant both mistakenly supposed the plaintiff's interest in such land to be but the undivided three-twentieths; that, on that day, the plaintiff sold to the defendant her supposed interest at a certain price per acre, which was paid and possession delivered accordingly; and that the plaintiff quitclaimed to the defendant all her interest in the whole tract, intending to thereby convey, and the defendant intending thereby to receive a conveyance for, only such supposed interest. Prayer for a reformation of the deed, for partition, for an accounting, "and for all proper relief."

**Held**, on demurrer, that the complaint, though uncertain and vague, is sufficient to entitle the plaintiff to relief.

From the Rush Circuit Court.

*L. Sexton and C. Cambern*, for appellant.

*B. L. Smith*, for appellee.

**PERKINS, J.**—This was an action by the appellant, against the appellee, in the Rush Circuit Court, to reform a deed, and for partition of certain real estate.

The complaint is as follows:

"Susan C. Fly, plaintiff, complains of William N. Brooks, defendant, and says, that, on the 19th day of March, 1872, the plaintiff was the owner of the following described land in Rush county, Indiana, to wit: The undivided one-fifth of two hundred acres, commencing at the south-west corner of the north-east quarter of section one, township thirteen, range ten; running thence north, on the west line of said quarter, twenty rods and four feet, to a stake two rods and fifteen feet south-westerly from a small buckeye tree; thence east, to the east line of seventy acres held by Mosely Brooks off of the west side of said quarter; thence south, to the south line of said quarter; thence west, to the place of beginning; also the south-west quarter of said section, township and range; also the south

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Fly v. Brooks.

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half of the south half of the west half of the south-east quarter of section thirty-six, township fourteen, range ten, containing twenty acres more or less ; by virtue of the will of her former husband, Thomas E. Brooks.

“That, on said 19th day of March, 1872, she sold and conveyed, by a deed of quitclaim, all her interest in said land, to the defendant, Brooks, for the sum of \$75.00 per acre ; that, at the time of the execution of said deed, both the plaintiff and defendant believed, that, under the will of her said husband, she was only entitled to the undivided three-fourths of one-fifth (or thirty acres) of said land ; and, at the time, the plaintiff intended to sell, and the defendant believed he was buying, only the undivided three-fourths of one-fifth (or thirty acres) of said land, and, so believing, paid to the plaintiff the sum of \$2,250, it being the price of said thirty acres of land at the contract price of \$75.00 per acre. Plaintiff further avers, that, at the time of the execution of said deed, she was wholly ignorant that she had any greater interest than that intended to be conveyed, but that, in fact, she had a greater interest, and was the owner of the entire undivided one-fifth (or forty acres), as above stated, and that the deed above named purports to and does convey the entire forty acres, instead of thirty acres, as was believed by the parties at the time the deed was made. Plaintiff further says, said defendant has been in the possession of said ten acres since the — day of March, 1872, and has received the rents and profits thereof, which were and are of the value of two hundred dollars.

“Therefore plaintiff asks that said deed may be reformed so as to convey and release only the plaintiff's right and title to thirty acres of said land, and that her title to the remaining ten acres be forever quieted, that the same be set apart to her, and that an accounting may be had for the rents and profits, for which she demands judgment, and for all proper relief.”

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Fly v. Brooks.

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A demurrer for want of facts was sustained to this complaint. The plaintiff, declining to amend, her complaint was dismissed. Proper exceptions were entered.

It is assigned for error in this court that the circuit court erred in sustaining the demurrer to the complaint.

The case made by the complaint is this, viz.: That on the 19th day of March, 1872, the plaintiff owned the undivided one-fifth of a tract of land containing two hundred acres, making her portion thereof forty acres, and on that day made a deed to said one-fifth to William N. Brooks, the defendant, and put him in possession of the same, which he has ever since, and still does retain and enjoy; that she intended to sell all the land she had in said tract, and the purchaser intended to buy all the land she had therein; that she did convey to him, by her deed, all of said land; that she did not sell the same in gross but by the acre, and at seventy-five dollars per acre; that, in estimating the number of acres, with the view to payment of the purchase-money, the parties made a mistake as to the quantity of land the plaintiff owned in said tract, the parties putting it at thirty acres, when it was in fact forty, just the quantity the plaintiff had conveyed by her deed, and just the quantity the purchaser took possession of and holds under it; that, in consequence of said mistake, the purchaser paid but twenty-two hundred and fifty dollars, leaving seven hundred and fifty dollars of the purchase-money still unpaid.

No explanation is made as to how the alleged mistake in the deed occurred, or when it was discovered. In fact, there was no mistake in the deed.

On the 6th day of June, 1877, between five and six years after the sale, and, so far as appears, without even asking for payment of the balance due on the purchase-money, the plaintiff commenced this suit to recover back a part of the land she owned and conveyed to Brooks, and of which he

Schmidt *et al.* v. Bomersbach *et al.*

had been in undisturbed possession, with her knowledge and consent, for between five and six years, and when, for aught that appears, she might at any time have recovered the purchase-money due for the land.

The complaint, as one to reform the deed, was subject to a motion to be made more certain; according to the following cases, perhaps to demurrer. *Baldwin v. Kerlin*, 46 Ind. 426; *Nelson v. Davis*, 40 Ind. 366; *Oiler v. Gard*, 28 Ind. 212; *Cox v. The Aetna Ins. Co.*, 29 Ind. 586; *Allen v. Anderson*, 44 Ind. 395; *The First National Bank of Centreville v. Gough*, 61 Ind. 147.

But the complaint shows that the plaintiff may have a right to recover the balance of the purchase-money, thus enforcing the contract made; and, if so, she is entitled to recover it in this suit. 2 R. S. 1876, p. 188, sec. 380.

To give the opportunity to settle this question, we reverse this case. See *King v. Brown*, 54 Ind. 368.

The judgment is reversed, with costs, and the cause is remanded for further proceedings in accordance with this opinion.

SCHMIDT ET AL. v. BOMERSBACH ET AL.

64	53
142	86
64	53
168	647

**WILL.**—*Contesting Validity of.*—*Complaint.*—*Necessary Averments.*—Where, in an action to contest the alleged last will of a testator, the complaint neither alleges the death of the testator, nor any legal interest, in the plaintiff, in the subject-matter, the complaint is insufficient on demurrer.

**SAME.**—*Copy of Will.*—The will is not the foundation of such action, and therefore a copy thereof, attached to the complaint, can not be looked to in determining its sufficiency.

From the Marion Circuit Court.

*H. W. Harrington, A. G. Howe, F. J. Mattler and H. C. Newcomb*, for appellants.

*J. T. Dye and A. C. Harris*, for appellees.

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*Schmidt et al. v. Bomersbach et al.*

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NIBLACK, J.—Kate Bomersbach, with her husband, Nicholas Bomersbach, and several other persons, commenced this action, in the court below, against Margaretta Schmidt and her husband, Joseph Schmidt, to contest the validity of an instrument in writing, purporting to be the last will and testament of one John Becker.

After some preliminary proceedings, which need not be here noticed, the defendants answered in general denial, and the cause was tried by a jury.

A general verdict was returned for the plaintiffs, together with answers to numerous interrogatories propounded to the jury on both sides, and a judgment was rendered declaring the alleged will invalid, and setting it aside.

One of the errors assigned here raises the question of the sufficiency of the complaint.

The complaint on which the cause was tried was as follows :

“ Come now the plaintiffs, Nicholas Bomersbach, Kate Bomersbach, George Richenbach, Eliza Richenbach, and Maggie Becker, John Becker, Mollie Becker, Emma Becker, Jacob Becker, Charles Becker and Della Becker, the last seven of whom are infants, and appear by their next friend Kate Bomersbach, and show to the court that the defendants have filed in this court, for probate, a paper purporting to be the last will and testament of John Becker, a copy of which is filed herewith and made a part hereof, marked ‘ Exhibit A.’ And plaintiffs show the court, that, at the time of the execution of said alleged will, the said John Becker was of unsound mind, and that said will was executed under duress, and was obtained by fraud, and the undue influence of Margaret Becker, and is not the last will of said Becker.

“ Wherefore plaintiffs pray that this court may decree that said pretended will is not the last will of said John Becker, and for all proper relief.”

The complaint was verified by the oath of Nicholas Bomersbach, one of the plaintiffs.

Section 39 of the act concerning wills provides, that "Any person may contest the validity of any will or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the court of common pleas" (now circuit court) "of the county where the testator died, or where any part of his estate is, his allegation in writing, verified by his affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress, or was obtained by fraud, or any other valid objection to its validity, or the probate thereof; and the executor and all other persons beneficially interested therein, shall be made defendants thereto." 2 R. S. 1876, p. 580.

It has been held by this court, and we think correctly, that the first clause of the foregoing section must, in connection with other sections of the statute, be construed to mean that any person, being a party in interest, may contest the validity of any will, and hence that, in an action to contest the validity of a will, the complaint must show the plaintiff to have an interest of some kind in the subject-matter involved in the contest. *Neiderhaus v. Heldt*, 27 Ind. 480; *Willett v. Porter*, 42 Ind. 250.

Nothing is averred in the complaint before us, showing the plaintiffs to have any interest, either in the estate of John Becker, the alleged testator, or in any other matter in any way involved in the contest. Neither is it averred what relations, if any, the defendants sustain to the will. Nor is the death of the said John Becker in any manner directly alleged. A man must be shown to be dead before his will can be contested.

The will sought to be contested was not the foundation of the action. The copy of it, which was filed with the complaint as an exhibit, did not, therefore, become a part

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*Achey v. The State.*

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of the complaint, and can not be used to supply any of the averments which the complaint ought to contain but does not. *The State, ex rel. Share, v. Boyd*, 68 Ind. 428; *Wilkinson v. The City of Peru*, 61 Ind. 1, and authorities there cited.

Because of the omissions above indicated, the complaint was clearly insufficient to sustain the proceedings had upon it below. As to the jurisdictional facts necessary to sustain the contest of the validity of a will, we cite the following cases: *Sutherland v. Hankins*, 56 Ind. 348; *Harris v. Harris*, 61 Ind. 117; *Thomas v. Wood*, 61 Ind. 182; *Coffman v. Reeves*, 68 Ind. 384.

The conclusion we have reached, as to the insufficiency of the complaint, renders it unnecessary that we shall consider the remaining questions discussed by counsel.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

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**ACHEY v. THE STATE.**

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135	264
64	56
137	350

64	56
1167	235

**CRIMINAL LAW.—Murder.—Evidence.—Reputation of Defendant for Peaceableness.—Cross-Examination.—Harmless Answer.**—On the trial of a defendant indicted for murder, wherein a witness had testified on behalf of the defendant, that he was a peaceable man, the counsel for the State, on cross-examination, asked the witness whether there was any difference between the defendant's disposition when intoxicated and when sober, to which the answer was that he was peaceable when intoxicated.

*Held*, that the question and answer, taken together, were harmless.

**SAME.—Instruction.—Statute Defining Murder and Prescribing the Penalty.**—An instruction to the jury in such case, reciting section 2 of the act defining felonies, 2 R. S. 1876, p. 428, being the statutory definition of murder in the first degree, and declaring the penalty therefor to be death, is correct as far as it goes, and is not erroneous as an independent instruction.

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*Achey v. The State.*

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**SAME.**—*Additional Instruction.*—The giving of an additional instruction, referring to such previous instruction, and reciting section 4 of such act, giving the jury the power to fix the penalty at imprisonment in the state-prison for life, in effect constituted both one proper instruction.

**SAME.**—*Malice.—Reasonable Doubt.—Provocation.—Consequences of Act.*—For instructions given at length and commended, see opinion.

**SAME.**—*New Trial.—Misconduct of Juror.—Affidavit.*—An affidavit in support of a motion for a new trial on the ground of misconduct of a juror should clearly identify the juror guilty of the alleged misconduct, and should clearly specify the facts alleged to constitute misconduct.

**SAME.**—*Juror's Expression of Opinion.*—Affidavits charging that one of the jurors, prior to the empanelling of the jury, had expressed an opinion that the defendant was guilty and should be hung, should unequivocally allege that the defendant and his counsel were ignorant of that fact prior to the empanelling of the jury.

**SAME.**—*Weight of Evidence.—Supreme Court.*—Where such motion, both supported and resisted by affidavits, has been denied by the court, the Supreme Court will not disturb such decision on the mere weight of the evidence afforded by such affidavits.

From the Marion Criminal Circuit Court.

*W. S. Ryan and C. B. Rockwood*, for appellant.

*T. W. Woollen*, Attorney General, and *J. B. Elam*, Prosecuting Attorney, for the State.

**BIDDLE, J.**—Indictment against the appellant for murder in the first degree, charged to have been committed in unlawfully, wilfully, feloniously, purposely, and with premeditated malice, killing George Leggett, by shooting him with a pistol.

Plea, not guilty; trial by jury; verdict, guilty; punishment, death.

Motion for a new trial; overruled; exceptions; judgment; appeal.

Numerous questions are reserved in the record, but all that have been discussed on behalf of the appellant arise under the motion for a new trial, and are as follows:

1. That the court admitted improper evidence to go to the jury;



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2. That the court gave improper instructions to the jury ;

3. The misconduct of the juror, Frederick Stein, during the trial ;

4. The misconduct of the juror, Thomas Dawson, during the trial ; and,

5. That the evidence is not sufficient to sustain the verdict.

1. That the court admitted improper evidence :

Daniel M. Noe was called as a witness, on behalf of the appellant, to testify as to his general character, and was asked the following questions :

" Q. Are you acquainted with the defendant's reputation for peacefulness and quietude as a citizen ?

" A. I am.

" Q. Is that reputation good or bad ?

" A. I have always known him as a peaceable, quiet man."

In the course of the cross-examination of the witness, the prosecuting attorney asked him the following question :

" Q. Do you know whether there was any difference in his disposition when under the influence of liquor and when not ?"

To this question the counsel for the appellant objected, because it did not enter into the question of his general character ; but the court overruled the objection, and the witness answered :

" A. I have seen him when under the influence of liquor, and always saw him peaceable and quiet."

This ruling is not erroneous. It is very clear that the question and answer, taken together, did not injure the appellant. The authority cited, *Fahnestock v. The State*, 23 Ind. 231, does not sustain the views of appellant's counsel. In that case, the question of intoxication had reference to the deceased, and not to the defendant.

2. That the court gave improper instructions to the jury.

The instructions complained of are as follows :

"1. Upon this indictment, the defendant being arraigned, for plea thereto says that he is not guilty. The issue being thus joined, before the jury can find the defendant guilty as charged, the State must have proved, beyond a reasonable doubt, every material allegation contained in the indictment; and until every reasonable doubt of defendant's guilt is thus removed, he is presumed to be innocent.

"2. Evidence is sufficient to remove reasonable doubt, when it is sufficient to convince the judgment of ordinarily prudent men of the truth of a proposition, with such force that they would act upon that conviction, without hesitation, in their own most important affairs.

"4. The indictment charges the highest degree of felonious homicide known to the law, to wit, murder in the first degree, and under it the jury, if the evidence requires it, may find the defendant guilty either of voluntary or involuntary manslaughter, or murder in the first or second degree.

"8. The word malice, in its popular sense, means personal spite, hatred, ill-will or hostility to another; yet, in its legal sense, it has a wider meaning, and characterizes all unlawful acts done with an evil disposition, a wrongful and unlawful motive, and such as proceed from 'a heart regardless of social duty, and fatally bent on mischief.'

"13. The accused is presumed to be of sound mind until the evidence raises a reasonable doubt thereof; and the law also presumes that every sane person contemplates the natural and ordinary consequences of his own voluntary acts, until the contrary appears, and when one man is found to have killed another by acts, the natural and

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ordinary consequences of which would be the death, if the facts and circumstances of the homicide do not of themselves, or the evidence otherwise, show that it was not done purposely, or create a reasonable doubt thereof, it is to be presumed that the death of the deceased was designed by the slayer.

“14. If a purpose, design or intention is formed by the slayer to kill a human being, and the act is done with malice but without premeditation, the defence comes within our statute defining murder in the second degree; but, if the element of premeditation is also present, then the offence is not murder in the second degree.

“15. The statute defining murder in the first degree, and fixing the penalty, reads as follows:

“‘If any person of sound mind shall purposely and with premeditated malice \* \* \* kill any human being, such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death.’

“19. If you should find from the evidence that the defendant killed the deceased, and that a reasonable doubt exists, either of the sanity of the accused at the time of the alleged commission of the act, or whether or not it was justifiable or excusable, you should find him not guilty.

“20. If the jury should find from the evidence, that the defendant and the deceased had been engaged in gaming with cards, and that deceased won from defendant a considerable sum of money, and all he had, and that afterwards deceased refused to loan to defendant even an inconsiderable portion of the amount won, and was offensive in language toward the defendant when applied to for the loan, such facts, on the trial of the defendant for the homicide, would of themselves neither justify nor excuse the killing.”

The court also gave the following instruction to the jury, to which no exception was taken:

"21. If the jury should find from the evidence, beyond a reasonable doubt, that the defendant is guilty of murder in the first degree, it is proper for you to consider, in fixing the penalty, the following section of the statute in the act defining felonies and fixing the punishment therefor, as follows:

"SEC. 4. Any person convicted of treason, or murder in the first degree, may instead of being sentenced to death, in the discretion of the jury, be imprisoned in the state-prison during life."

"Although that section of the statute defining the offence of murder in the first degree fixes the penalty at death, under the section of the statute last read, if in your discretion you so determine, you may, instead of sentencing to death, substitute imprisonment in the state-prison during life. It is the exclusive province of the jury to determine for themselves the questions of penalty, as well as all other matters of law and fact arising in the case."

In our opinion, neither of the instructions, numbered 1, 2, 4, 8, 13, 14, 19 and 20, above, is erroneous; but we think that these, taken together, and with others given which were not excepted to, present a full and fair exposition of the law of the case.

It is strongly urged in behalf of the appellant, that the instruction numbered 15, above, is erroneous in not stating the discretionary power reposed in the jury to inflict the punishment of death or imprisonment for life, for murder in the first degree, as the evidence might seem to warrant, and, being erroneous, can not be corrected by a subsequent instruction, unless the former instruction is withdrawn.

We fully recognize the principle, that an instruction which is wrong can not be corrected by an instruction which is right; but instruction 15 is not wrong, as far as it goes. The jury might follow it if they thought proper. It only purports to recite the statute, which it does correct-

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ly, and does not instruct the jury, that if they find the defendant guilty of murder in the first degree, they shall make his punishment death, but only, that, by that section, the penalty was death. By instruction 21, the subsequent section, giving the discretionary power to the jury in fixing the punishment for murder in the first degree, is properly stated, and the section mentioned in instruction 15 referred to, and thereby made a part of instruction 21. It does not seem to us that there is any available error in this. This court has held that an instruction, which, as far as it is given, is not wrong, will not be held erroneous in this court, merely because it is not more full and complete. *Bissot v. The State*, 53 Ind. 408. So we think, that merely stating section 2 of the felony act, which is the only one that defines the crime of murder in the first degree, for the purpose of defining it to the jury, and also stating the penalty expressed in that section, which is separated from the definition of the crime only by a comma, and afterwards stating section 4 of the same act, which gives to the jury the discretionary power in fixing the punishment, when taken together, can not be regarded as erroneous.

In our opinion, the court did not err in instructing the jury. *Kirland v. The State*, 43 Ind. 146; *Bissot v. The State*, 53 Ind. 408; *Jarrell v. The State*, 58 Ind. 298; *Sullivan v. The State*, 52 Ind. 309.

4. The misconduct of the juror, Frederick Stein, during the trial.

We can not discover any ground charging the juror Stein, with misconduct. The affidavit of James W. Gray states that a "daily newspaper, published in said county and State, was produced by one of said jurors, who proceeded to read an article in and from said copy of said 'Indianapolis Journal' to, and in the presence of, said jury;" but it does not state that the juror, who so produced and

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read the paper, was Frederick Stein. The counsel for appellant, in their brief, treat the affidavit of Gray as if it meant Stein as the juror alluded to. Stein, in his affidavit, however, substantially denies the charge. Besides, the article alleged to have been read in the jury room has no reference to the appellant, and, if it had any influence on the jury, it would be hard to tell whether it was against the appellant or in his favor. We do not perceive any force in the charge of misconduct against Stein.

4. The misconduct of the juror, Thomas Dawson, during the trial.

Several affidavits, appended to the motion for a new trial, state that the juror, Dawson, before he was empanelled as a juror in the case, and some time before the trial, stated that the persons in prison at the time, of whom the appellant was one, had committed murder and ought to be hung, and other words unfavorable to the prisoners. These statements are denied by Dawson in his affidavit, which is supported by the affidavits of others.

There is no fair preponderance of evidence in favor of the charge of misconduct against Dawson as a juror in the case. Besides, it is nowhere stated that the appellant did not know all these facts before Dawson was empanelled as a juror.

The affidavit of James M. Biddy states "he did not inform said attorneys" (of appellant) "of the matters, until after the conclusion of said trial;" but this goes only to what Biddy stated, and by no means shows that the appellant and his attorneys did not know all the facts set up in the affidavits before the juror was empanelled. It does not seem to us that the conduct of the jurors injured the appellant in the least. In such case it must clearly appear that the party complaining was injured, or the judgment will not be disturbed. *Romaine v. The State*, 7 Ind. 63; *Bersch v. The State*, 18 Ind. 434; *Harrison v. Price*, 22 Ind.

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165; *Whelchell v. The State*, 23 Ind. 89; *Flatter v. McDermitt*, 25 Ind. 326; *Medler v. The State, ex rel., etc.*, 26 Ind. 171; *Morgan v. The State*, 31 Ind. 198; *Clem v. The State*, 33 Ind. 418; *Cluck v. The State*, 40 Ind. 268; *Harding v. Whitney*, 40 Ind. 379; *Scranton v. Stewart*, 52 Ind. 68; *Holloway v. The State*, 53 Ind. 554; *Beard v. The State*, 54 Ind. 418.

5. That the evidence is not sufficient to sustain the verdict.

The killing, as alleged in the indictment, is proved beyond any doubt; indeed, the only point urged against the evidence is, that it does not sufficiently prove that the act of killing was done with premeditation. It is clear to us, that, at the time the act was done, there was no immediate provocation from the deceased, and no cause for a sudden heat upon the appellant. The palliating facts, if any existed, had occurred several days before the killing was done. Unfriendly words, but not remarkably high nor heated, had passed between the parties several hours before the killing, but not such as amounted to any justification or excuse, or even palliation, of the act. Having the deadly weapon prepared, shooting instantly when the opportunity offered, without any immediate provocation, or any thing to excite a sudden heat of passion, are strong facts against the appellant.

It appears to us that the jury was justified in finding that the killing was done purposely and with premeditated malice.

As an appellate court, there is no ground for us to disturb the verdict.

The judgment is affirmed, at the costs of the appellant.

Petition for a rehearing overruled.

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RODMAN ET AL., ADM'RS, v. RODMAN ET AL., ADM'RS.

**DECEDENTS' ESTATES.—Foreclosure of Mortgage Executed by Decedent.—No Personal Judgment.—Promissory Note.**—In an action to foreclose a mortgage on lands belonging to the estate of a decedent, executed by him in his lifetime to secure the payment of a promissory note also executed by him, to which the administrator is not a party, there can be no personal judgment over for any residue of the mortgage debt remaining unsatisfied on sale of the mortgaged premises.

**SAME.—Claim for Residue.—Merger.—Cause of Action.—Measure of Damages.**—The judgment of foreclosure in such action does not merge such promissory note; and any claim against the decedent's estate, for an unpaid residue of the mortgage debt, is founded, not upon the judgment of foreclosure, but upon such note; and the administrator is not bound by, but may go behind, the judgment of foreclosure to show the amount really unpaid.

**COMPOUND INTEREST.—Contract for Extension of Time.—Evidence.**—Evidence that, subsequent to an offer by the debtor to pay interest on interest accrued, in consideration of an extension of the time of payment for a specified period, the attorney of the creditor had indefinitely extended such time, pursuant to a direction by the creditor to give the debtor "all the time that could be safely given," does not sustain a complaint based upon an alleged contract to pay interest on interest accrued, in consideration of an extension of time.

From the Washington Circuit Court.

*F. Emerson, T. L. Collins and A. B. Collins*, for appellants.  
*J. S. Butler*, for appellees.

**PERKINS, J.**—In this cause, a decision was rendered at the November term, 1876, Judge DOWNEY delivering the following opinion:

"This was a claim filed by Martha A. Rodman, administratrix, and William P. Butler, administrator, of the estate of Thomas J. Rodman, deceased, against Thomas J. Rodman and Charles H. Rodman, administrators of the estate of Walker B. Rodman, deceased.

"The claim is in five paragraphs.

"In the first it is alleged, that, on the 16th day of May, 1867, Walker B. Rodman, by his note of that date, which,



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is filed herewith, promised, three years after date, to pay Thomas J. Rodman ten thousand dollars, with eight per cent. interest from date; that the note was secured by a mortgage on real estate in Jackson county, Indiana; that, by decree of the Jackson Circuit Court, the said land was sold by the sheriff of said county on June 28th, 1873, to pay said note, interest, and costs of foreclosure and sale, and the amount realized, after paying said costs, on said note, was eleven thousand two hundred and sixty-five dollars and ninety-two cents, which is a credit on said note of date of June 28th, 1873, leaving due and unpaid the sum of three thousand six hundred and twenty-seven dollars and forty-one cents, with interest at eight per cent. from said date, for which they ask an allowance in the sum of four thousand five hundred dollars, and that the allowance be paid as a preferred mortgage claim.

"In the second paragraph it is alleged, that, on the 16th day of May, 1867, the said Walker B. Rodman, by his note of that date, which is filed herewith, promised, four years after date, to pay Thomas J. Rodman ten thousand dollars, with eight per cent. interest from date; that the said note was secured by a mortgage on real estate in Jackson county, Indiana; that, by decree of the Jackson Circuit Court, the said land was sold by the sheriff of said county on June 28th, 1873, to pay said note, interest, and the costs of said decree and sale; that the amount realized on said note, after paying said costs, was eleven thousand two hundred and sixty-five dollars and ninety-two cents, which is a credit on said note of date of May 16th, 1867, leaving due and unpaid the sum of three thousand six hundred and twenty-seven dollars and forty-one cents, with interest at eight per cent. from said date, for which they ask an allowance in the sum of forty-five hundred dollars, and that it be paid as a preferred mortgage debt.

"In the third paragraph it is stated, that, after the death

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of said Thomas J. Rodman, on the 1st day of September, 1871, the said Walker B. Rodman promised these claimants, by his promise in writing, a copy of which is filed herewith, to pay interest on the interest which was due at that date, in consideration of forbearance to collect the interest then due; and claimants say there was interest due, at the date of said promise, on two notes for ten thousand dollars each, dated May 16th, 1867, at eight per cent. from date, amounting to nine thousand five hundred and eighty-six dollars and sixty-six cents, and said claimants accepted said promise, and did forbear to collect said interest, in consideration of said promise, until the estate of said promisor was being settled up, after his death, to wit, on the 13th day of May, 1873. Wherefore, etc.

“ The fourth paragraph is predicated on a promissory note for ten thousand dollars, dated May 16th, 1867, executed by said Walker B. Rodman to said Thomas J. Rodman, with eight per cent. interest from date, which note it is alleged is filed with the claim.

“ The fifth paragraph is in the same form, on a note for the same amount, of the same date, and between the same parties, as that mentioned in the fourth paragraph, and it is alleged that the same is filed with the claim. But two notes, and a letter as the contract referred to in the third paragraph, are filed with the claim.

“ Demurrers to the first, second, fourth and fifth paragraphs were filed by the defendants, and overruled by the court.

“ There was an answer in denial, a trial by the court, and a finding for the plaintiffs in the sum of ten thousand two hundred and eighty-two dollars and seventy-seven cents, and the court declared the same an allowance against the estate of said Walker B. Rodman, deceased. The court refused to order that the allowance draw interest at eight per cent., or to make the same a preferred claim against the estate.

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" A motion for a new trial was made by the defendants, which was overruled by the court.

" The errors assigned are :

" 1. Overruling the demurrer to the first paragraph of the complaint ;

" 2. Overruling the demurrer to the second paragraph of the complaint ;

" 3. Overruling the demurrer to the fourth paragraph of the complaint ;

" 4. Overruling the demurrer to the fifth paragraph of the complaint ; and,

" 5. Overruling the motion for a new trial.

" The question made under the first and second assignments of errors is, whether or not the plaintiffs, having failed to take a judgment over in the foreclosure case, can recover the residue left unpaid after the sale of the mortgaged premises, the mortgaged premises not selling for a sum sufficient to satisfy the debt.

" In *Newkirk v. Burson*, 21 Ind. 129, it was decided that no judgment over could be rendered in such a case.

" We think it clear, that the fact that no such order was made can not prevent an allowance of the residue as a claim against the estate. In this case, there neither was nor could have been any personal judgment in the foreclosure case. The object and effect of that judgment were to exhaust the mortgage security by a sale of the mortgaged premises, and the application of the proceeds to the satisfaction of so much of the debt, leaving the representatives of the mortgagee at liberty to proceed against the estate of the mortgagor for the residue. We do not think there was any such merger of the cause of action in the judgment of foreclosure as could bar the right of the mortgagee or his representatives to file the claim for the residue against the estate of the mortgagor. The case is, or is analogous to, a proceeding *in rem* against property of

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the debtor, whereby a part only of the debt is made, in which case it has never been held, that we are aware of, that there is a merger of the cause of action. On the contrary, it is uniformly held that the judgment, by which the property is subjected, can not be made the foundation of another action, but that any subsequent action must be upon the original cause of action. See *Lipperd v. Edwards*, 39 Ind. 165. But the question involved appears to have been decided in *Cole v. McMickle*, 30 Ind. 94.

“No question is argued under the third and fourth assignments of error.

“We proceed to examine the questions made under the fifth assignment, relating to the overruling of the motion for a new trial. The main question here is, whether or not the evidence sustains the third paragraph of the complaint, which is predicated on the agreement to pay interest upon the accrued interest.

“The only evidence in support of this paragraph is the following, a letter from Walker B. Rodman to William P. Butler, one of the plaintiffs, dated September 1st, 1871, in which he says:

“‘I received yours of August 18th, stating that you could give till January, '73, by paying the interest. I have a considerable lot of stock feeding, and for sale between January and April. I would wish you to give time until I make some sales, and I will pay you interest upon interest until paid. Please let me know in regard to the White River farm. According to brother's arrangement and mine, there will be \$350 due the estate the 1st of March next. We are all well,' etc.;

“And the testimony of J. S. Butler, as follows:

“‘In the same fall, and a short time after the letter filed with the claim, dated Sept. 1st, 1871, from Walker B. Rodman to W. P. Butler, one of the administrators of the estate of Thomas J. Rodman, deceased, and one of the

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plaintiffs, was received by said Butler, he, Butler, went in person to see Walker B. Rodman, and I accompanied him. He did see said Walker B. Rodman, and afterwards instructed me, as his attorney, to give said Rodman all the time that could be safely given on said claim, and for said interest.'

"It appears to us that this evidence does not show any agreement between the parties. In his letter, Walker B. Rodman acknowledges the receipt of a letter from Butler, one of the plaintiffs, stating that he could give 'till January, '73, by paying the interest.' He does not, however, accept this offer, but says: 'I have a considerable lot of stock feeding, and for sale between January and April. I would wish you to give time until I make some sales, and I will pay you interest upon interest until paid.'" The evidence of Mr. Butler, the attorney, fails to show an acceptance of this proposition, but shows that his client instructed him 'to give said Rodman all the time that could be safely given on said claim, and for said interest.' This was not the consideration for which Walker B. Rodman agreed to pay 'interest upon interest.' The fact that time was given does not prove the contract. The parties did not agree upon the same terms. This they must do in order to make a valid contract.

"The cross errors are not assigned on the transcript, and, although argued by counsel for appellee, can not be considered.

"The interest on interest embraced in the judgment is \$330.71. If this amount shall be remitted within sixty days, as of the date of the judgment, the judgment as to the residue will be affirmed. If not, the judgment will be reversed, and, in either case, at the costs of the appellees."

A petition for a rehearing was filed, which commenced thus:

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"On behalf of appellants, we respectfully petition the court for a rehearing of the cause, believing that a review of the record will result in a different decision. We do not ask the court to review the questions of law; but we insist that the judgment was too large upon the facts, even after the remission of the amount directed by the court."

This court granted the petition February 13th, 1877. On the 30th of May, 1877, the cause was resubmitted.

In their brief, on the resubmission, counsel for the appellees say:

"But if this court should require appellees, as a condition to the affirmance of the former decision, to remit a further amount, appellees request that an order be made, permitting them to withdraw the remittance of \$330.71 heretofore made, so that, when the case goes back to be tried again, the remittitur already made may not be a bar to any rights of the appellees."

The facts of the case, shortly stated, are these, as gathered from the record:

Walker B. Rodman executed two notes, of ten thousand dollars each, drawing eight per cent. interest, to Thomas J. Rodman, and secured their payment by a mortgage on land. He did not pay the notes, or the interest on them. Thomas J., the payee, and Walker B., the payor, of the notes and mortgage, both died. The administrators of the payee of the notes and mortgage foreclosed the mortgage against the heirs of the mortgagor (his administrators not being parties), obtained a decree for the sum of thirty-one thousand five hundred and forty-four dollars, and an order of sale thereon.

The order of sale was issued to the sheriff for the nominal amount of the decree, but contained a statement that a payment had been made upon the decree, and "upon it there is due" (says the order of sale) "the sum of twenty-nine

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thousand six hundred and thirty-three dollars and thirty cents, principal and interest, and the further sum of seventy-four dollars and fifty-five cents costs accrued to this time. You are therefore commanded to levy the said sums of money," etc.

The sale produced the sum, beyond that required to pay costs, of twenty-two thousand five hundred and thirty-one dollars, which, deducted from the amount due in the decree, would leave of the decree, unsatisfied by the sale, the sum of seven thousand one hundred and five dollars, instead of the sum of nine thousand dollars, if you deducted these proceeds of the sale from the nominal amount of the decree, a difference of some nineteen hundred dollars. We have not attempted to be minutely accurate as to amounts.

The present appeal was from the judgment on a claim filed in the circuit court by the administrators of Thomas J., against the administrators of the estate of Walker B. Rodman, to obtain an allowance for the balance unpaid by the sale of the mortgaged property. They filed the decree of foreclosure and the notes, etc., and claimed, and got allowed, the nine thousand dollars above mentioned.

The administrators of Walker B.'s estate claimed a right to show the amount really unpaid was but a sum between seven and eight thousand dollars, and it seems to us that they should have been allowed to do so; and that the amount of the claim allowed was excessive, and that this error entitled the appellants to a new trial.

As we have said, the administrators of Walker B. Rodman were not parties to the suit foreclosing the mortgage, and, of course, not bound by it as to amount; but the claim for the deficiency on that sale is filed against them. They must have the right to go behind the judgment in the foreclosure proceedings on this question, and have the amount due determined by taking the account on the original claims. Such accounting will show the judgment of

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the circuit court on the claims to be much too large; but how much, it is not proper for us to say, as the question is to be again tried below.

The judgment is reversed, with costs, and the cause remanded for a new trial. The entry of remission heretofore made is set aside, and the party making it is permitted to withdraw the same.

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DOHERTY ET AL. v. CHASE.

**REVIEW OF JUDGMENT.—Failure to Default Defendant.**—Where a defendant has been served with process, the fact that, either with or without an appearance by him, he was not defaulted, is not ground sufficient to review or reverse a valid judgment rendered therein against him.

**SAME.—Complaint on Bond Securing Performance of Contract.—Principal and Agent.—Principal and Surety.**—In an action by the obligee, against the principal and surety, on a bond executed to secure the performance of a written contract appointing the principal an agent of the plaintiff to sell certain articles, and binding him to turn over notes and money, less his commissions, to guarantee the plaintiff against the loss of any such property, and to furnish a satisfactory bond, etc., the complaint alleged, as breaches of the bond, which was broader in its terms than the contract, that the principal, in the course of such business, had received and refused to turn over sums of money belonging to the plaintiff, and had turned over notes of insolvent makers, etc.

**Held,** in a proceeding to review a judgment rendered in such action against the defendants, that the complaint therein was sufficient.

From the Montgomery Circuit Court.

*J. M. Thompson, W. H. Thompson, P. S. Kennedy, W. T. Brush and G. W. Paul,* for appellants.

*W. P. Britton and M. W. Bruner,* for appellee.

**BIDDLE, J.**—Complaint by the appellants, against the appellee, to review a judgment, for error of law appearing in the proceedings and judgment.

The grounds of review are, that the record does not show

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that the defendants therein were duly served with process, nor that the defendants, who are appellants here, ever appeared to the action.

We may add, at once, that, by a *certiorari*, the record has been completed, and one of these two grounds of error no longer exists.

The record now shows that the defendants had been regularly served with process, and contains the summons and return. The original record also contains this entry :

“Come now the parties by their attorneys, and defendant Scott and all other defendants files demurrers to plaintiff’s complaint, to wit:”

Then follows a demurrer by Scott, but there is no demurrer in the record by the other defendants.

Scott’s demurrer was overruled. He then answered by a general denial, and a special paragraph.

Trial by jury; verdict and judgment for the plaintiff, against all the defendants.

There was no motion made for a new trial.

The record thus shows, that the parties asking this review had been regularly served with process, and had appeared to the action in which judgment was rendered against them, without withdrawing their appearance or having been defaulted. This may be an irregularity, but it is not such an one as would reverse a judgment in this court. *Sloan v. Wittbank*, 12 Ind. 444. And even if we held that the record does not show an appearance of the defendants to the suit, yet the judgment—there being good service had, and shown in the record, and damages assessed by a jury—would not be reversible merely because the defendants had not been defaulted by calling. *Smith v. Foster*, 59 Ind. 595.

The appellants, however, still urge, as a ground of review, the insufficiency of the complaint in the original case to constitute a cause of action.

The complaint is founded on a bond, conditioned that

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William W. Scott will comply with a certain written contract between him and the appellee; and the objection urged against it is, that the breaches assigned in the complaint are broader than the terms of the written contract, that the liability on the bond can not be greater than the terms imposed by the contract, and that there are no breaches assigned which show that the contract has been broken. By the contract, Scott was made the agent of Chase in selling sewing machines, and by it undertook "to make weekly reports of machines on hand and machines sold, and turn in notes and moneys from week to week, reserving such amounts as may be due" him for commissions, and to furnish a satisfactory bond in the sum of two thousand dollars for the proper conduct of the business, and to guarantee Chase against loss of any property entrusted to his hands, and to bear all expenses of transportation and sale of the machines.

The conditions of the bond are at least as broad, and perhaps broader, than the terms of the contract.

The breaches alleged in the complaint are, that Scott became largely indebted to Chase for machines sold, stating the various amounts, and notes given by Scott to Chase in the course of the business, which he has refused to pay over according to the terms of the agreement, setting out the notes; that he turned over certain notes, the makers of which were insolvent; and various other specific charges of the misconduct of Scott in conducting the business of his agency.

Many of these breaches, and we think all that are alleged, are violations of the contract, the performance of which the bond was given to secure; but, if one be good, the complaint was sufficient.

We can perceive no error appearing in the proceedings and judgment sought to be reviewed.

The judgment is affirmed, at the costs of the appellants.

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Scott et al. v. Silvers.

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## SCOTT ET AL. v. SILVERS.

64	76
127	38
64	76
144	386

**DESCENTS.—Widow's Descendants.—Complaint.—Action to Quiet Title.—Enjoining Guardian's Sale of Land.**—A complaint alleged that a certain person had died intestate, seized in fee-simple of certain real estate, leaving a widow, but no child or parent, surviving him; that subsequently the widow died, leaving the plaintiffs, her brothers and sisters and the children of such as had died, but no child or parent, surviving her; and that the defendant, as guardian of a ward not alleged to have been related to the intestate husband, was about to sell such real estate pursuant to an order of court. Prayer, that such sale be enjoined, and that the plaintiffs' title be quieted. *Held*, on demurrer, that the complaint is sufficient.

**SAME—Death of Widow who was a Second Wife.—Grandchild by Previous Marriage.**—A husband died intestate, leaving no parent, but leaving a widow, who was his second wife and who had borne him a child which did not survive him, and also a grandchild which was the child of a deceased child by his previous marriage, surviving him. Subsequently the widow died without having remarried, leaving brothers and sisters, but no parent or child surviving her.

*Held*, that, upon the death of the widow, all the real estate of which the husband had died seized, descended to the grandchild.

**SAME.—Section 2 and Proviso of Section 24 Construed.**—The words "children alive," in the proviso of section 24 of the statute of descents, 1 R. S. 1876, p. 412, must, to give effect to section 2 of that act, be construed to mean "children or their descendants alive."

From the Huntington Circuit Court.

*W. H. Trammel* and *J. R. Coffroth*, for appellants.

*H. C. Fox*, *H. B. Sayler* and *J. B. Kenner*, for appellee.

**BIDDLE, J.**—The first paragraph of the complaint in this case states the following facts:

That Joseph E. Silvers died, intestate, on the 6th day of February, 1872, leaving no child and no father or mother surviving him, but leaving his wife, Abigail A. Silvers, his widow, who, on the 9th day of February, 1872, also died, intestate, leaving no child, father or mother or husband surviving her, but leaving Abner S. Scott, Daniel Scott and Samuel S. Scott, her brothers, and Sarah S. Simmons, her sister, and John W. Scott, her nephew, the son of her brother, Amos Scott, deceased, surviving her; that said

Joseph E. Silvers, at the time of his death, was seized in fee-simple of certain lands, which are described ; that said real estate descended to Abigail A. Silvers on the death of her husband, Joseph E. Silvers ; that, on the 7th day of June, 1872, the said William B. Silvers, as the guardian of Horatio D. Silvers, a minor child of John Silvers, filed his petition in the court of common pleas to sell the above described real estate ; and, on the 14th day of October, 1872, obtained an order of said court to sell the same, in pursuance of which order he sold said real estate to David Rudig, one of the defendants. Prayer for injunction, to quiet title, and for general relief.

The second paragraph of the complaint differs from the first only in alleging that Abigail A. Silvers was a second wife, by whom Joseph E. Silvers had a child, but none that survived him ; and that he left surviving him Horatio D. Silvers, the child of a child by a former marriage.

Separate demurrers were filed to each of these paragraphs, alleging as ground the insufficiency of the facts therein stated, and overruled by the court. Exceptions were reserved, and the case appealed.

The rulings upon these demurrers present the only questions in the case.

The facts alleged in the first paragraph of the complaint show the death of a husband, intestate, leaving no child, and no father or mother, but leaving a widow, surviving him.

We think, under these facts, according to sec. 26, 1 R. S. 1876, p. 413, the whole of his property went to his surviving widow. *Shaw v. Breese*, 12 Ind. 392 ; *Rusing v. Rusing*, 25 Ind. 63 ; *Leard v. Leard*, 30 Ind. 171 ; *Sullivan v. McGowen*, 33 Ind. 189 ; *Lindsay v. Lindsay*, 47 Ind. 283 ; *Hoffman v. Bacon*, 50 Ind. 379.

Counsel urge it upon us, under the first paragraph of the complaint, that the word "child," as used in sec. 26, 1 R.

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Scott *et al.* v. Silvers.

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S. 1876, p. 413, should be held to mean "grandchild," as well as "child;" but we can not perceive any such question presented by the first paragraph. It does not contain any averment that Joseph E. Silvers left a grandchild surviving him. It is not averred in the first paragraph that Horatio D. Silvers is the grandchild of Joseph E. Silvers, or that he was any relation to him whatever; nor is it shown that Abigail A. Silvers was a second wife.

The facts alleged in the second paragraph of the complaint show the death of a husband, intestate, leaving no father or mother, but leaving a grandchild, and a widow, who was a second wife, by whom he had one child, but which was not living at the time of his death, and the subsequent death of the widow.

We are of opinion, that, upon this state of facts, the grandchild, standing in the place of a child of the deceased, Joseph E. Silvers, will, under section 2 and the proviso in section 24, construed together, inherit the entire property. Any other construction of the statute would ignore section 2 entirely. The words "children alive," as used in the proviso of section 24, must be held to mean "children or their descendants alive." This is in accordance with *Kyle v. Kyle*, 18 Ind. 108, and not in conflict with *Ogle v. Stoops*, 11 Ind. 380, nor the cases which follow it, wherein the facts of the cases are considered.

It was evidently the intention of the Legislature, that, when a new line of descent was commenced by the marriage of a second or subsequent wife, and ended with the wife for want of issue, it should be cast back into the original line from which it was diverted by such marriage.

The second paragraph of the complaint shows no cause of action in favor of the appellants; the court, therefore, committed no error in sustaining the demurrer to it for want of alleged facts; but, as the court sustained a demur-

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Miller, Executor, v. Steele *et al.*

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rer to the first paragraph of the complaint, which is sufficient on its face, the judgment must be reversed, with costs, and the cause remanded for further proceedings.

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MILLER, EXECUTOR, v. STEELE ET AL.

DECEDENTS' ESTATES.—*Reopening Final Settlement.*—*Negligence of Executor in Collecting Debts Due Estate.*—*Credit for Worthless Claim.*—Negligence on the part of an administrator or executor, in failing to attempt to collect a matured promissory note belonging to his decedent's estate and described upon the inventory thereof, until the maker became insolvent and the note worthless, is ground sufficient, under section 116 of the decedents' estates' act, to reopen the final settlement of such executor or administrator, wherein he had asked and received a credit for the amount of such note as a worthless claim.

SAME.—*Mistake.*—*Fraud.*—Fraud or mistake on the part of the executor or administrator in making final settlement of his trust is ground sufficient for reopening such settlement.

From the Montgomery Circuit Court.

A. Thomson, B. T. Ristine, T. H. Ristine, and H. H. Ristine, for appellant.

W. P. Britton and M. W. Bruner, for appellees.

Howe, C. J.—In this action, the appellees sued the appellant, in a complaint of three paragraphs.

To each of these paragraphs the appellant demurred, upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and the appellant excepted, and then answered in three paragraphs.

The appellees replied, by a general denial, to the second and third paragraphs of appellant's answer.

The issues joined were tried by a jury, and a verdict was returned for the appellees.

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Miller, Executor, v. Steele *et al.*

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The appellant's motions for a new trial, and in arrest of judgment, were severally overruled by the court, and to each of these decisions he excepted, and judgment was rendered on the verdict.

In this court, the appellant has assigned, as errors, the several decisions of the court below, in overruling his demurrer to the different paragraphs of the appellees' complaint, and his motions for a new trial and in arrest of judgment.

We will consider first the sufficiency of the complaint.

In the first paragraph of their complaint, the appellees alleged, in substance, that, on the — day of —, 1872, William Miller, the father of the appellees and also of the appellant, died, leaving them, the appellees and appellant, as his only heirs at law; that afterward, on the 18th day of October, 1872, the appellant was duly appointed and qualified as the executor of the estate of said William Miller, deceased; that, as such executor, he made and filed an inventory, containing a list of the assets of said estate coming into his hands, among which were two promissory notes signed by A. J. Snyder, one dated March 27th, 1872, for three hundred and eighty-seven dollars, and the other for three hundred dollars, dated the 18th day of —, 1869; that said notes amounted in the aggregate to eleven hundred dollars; that, on the 2d day of October, 1875, the appellant, as administrator, but in reality as executor, made a pretended final settlement of said estate, which was approved by the court below, and he was thereby discharged from the further execution of his said trust; that, in said settlement, the appellant asked a credit of seven hundred and sixty-seven dollars and thirty-one cents, on account of the insolvency of said A. J. Snyder, the said notes, as the appellant alleged, not being collectible for that reason; that the appellant made no explanation whatever of the circumstances of the insolvency of said Snyder, in said settlement,

but simply asked credit for the amount of said two notes because Snyder was insolvent and the notes were not collectible, and for no other reason; that the appellant did receive a credit for the amount of said two notes, in said final settlement; but the appellees averred, that the allowance of such credit was illegal and wrongful, and should never have been made; that, at the time the appellant took said notes into his possession, as executor, they were good, solvent and due, and, for a long time thereafter, they could have been collected from said Snyder, if the appellant had made a proper effort to collect them; that the appellant entirely failed to prosecute said Snyder on said notes, but allowed them to stand until he became insolvent and unable to pay his debts; that the appellees were unable to give a more particular description of said notes, for the reason that the appellant, in making his final settlement, did not file them with the files of said estate, and had retained them, as the appellees believed, in his possession; that the appellant was negligent in collecting said notes, whereby they were wholly lost to said estate; that the appellant was in reality the executor of said estate, although he had described himself, in said final settlement, as administrator thereof. Wherefore the appellees asked that said final settlement be revoked and reopened, and for all other proper relief.

It will be seen from the averments of this paragraph of their complaint, that the appellees sought therein and thereby to have the appellant's final settlement of the estate of William Miller, deceased, revoked and reopened, upon the ground that such final settlement appeared to have been illegally made.

In section 116 of the act providing for the settlement of decedents' estates, approved June 17th, 1852, it is provided as follows:

“**SEC. 116.** After the debts and legacies of an estate and  
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charges of administration are paid, and all claims in favor of such estate are disposed of according to law, the executor or administrator shall be discharged from the further administration thereof, and no final settlement shall be revoked or reopened, except by appeal to the circuit court, and the same shall there appear to have been illegally made: *Provided; however,* That any person interested in said estate so settled, may have said settlement set aside for mistake or fraud, at any time within three years after said settlement, and if such person be under any legal disabilities at the time of said settlement, then within three years after the removal of such disability." 2 R. S. 1876, p. 537.

It will be observed, that, in the first paragraph of their complaint, the appellees do not charge the appellant with either mistake or fraud, in express terms, in making his final settlement of the estate of his testator, William Miller, deceased. It is alleged that the appellant was negligent, in and about the collection of the Snyder notes; but it is not directly alleged that his final settlement of his testator's estate was illegally made. It seems to us, however, that it may be inferred, fairly and reasonably, from the facts averred in the first paragraph, that the final settlement had been illegally made by the appellant, in this, that he had asked and obtained credit, in his final settlement, for the amount of the Snyder notes, which, by his failure, as alleged, to use due diligence in collecting the same, had become lost to his decedent's estate.

The appellees alleged, that, when the appellant, as executor, took possession of said notes, they were good, solvent and due, and that, for a long time thereafter, they could have been collected from said Snyder, if the appellant had made a proper effort to collect them. If these averments were true, and by his demurrer the appellant admitted their truth, it is very clear, we think, that the allowance of a credit to the appellant, in his final settlement, for the

amount of the Snyder notes, was illegal and wrongful, and ought never to have been made. If the allowance of such credit to the appellant, in his final settlement, was illegal and wrongful, then the settlement would appear to have been illegally made; and, if the settlement shall "appear to have been illegally made," then, under the terms of the statute, it ought to be "revoked or reopened."

The law demands of an executor or administrator diligence in the discharge of the duties of his trust. In section 151 of the decedents' estates' act, the executor or administrator is clothed with "full power to maintain any suit in any court of competent jurisdiction, in his name as such executor or administrator, for any demand of whatever nature due the decedent in his lifetime." 2 R. S. 1876, p. 546. If the executor or administrator is lenient or indulgent to the debtors of his decedent, and forbears to sue them, he acts at his peril and incurs a personal liability, which may result in serious loss. For, in section 162 of the act for the settlement of decedents' estates, it is provided, that "Any executor or administrator may be sued on his bond, by any creditor, heir, legatee, or surviving or succeeding [executor or administrator], co-executor or co-administrator of the same estate, for any of the following causes, viz.: \* \*

"*Third.* Failure to use due diligence in collecting claims due the estate." 2 R. S. 1876, p. 349.

In our opinion, the facts alleged by the appellees in the first paragraph of their complaint were sufficient to show that the final settlement, therein mentioned, had been illegally made by the appellant, and ought to be revoked or reopened. The demurrer to this paragraph was correctly overruled.

There is no substantial difference in the allegations of the second, from those of the first, paragraph of the complaint. It was alleged in the second paragraph, that the delay of the appellant, in the collection of the Snyder notes, was fraudu-

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Miller, Executor, v. Steele *et al.*

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lent as well as negligent, and that is the only difference we have found between the allegations of the two paragraphs. The paragraph was sufficient, we think, without the fraudulent charge, and that charge will not vitiate the paragraph, but we fail to see that it is strengthened thereby. The court did not err in overruling the appellant's demurrer to the second paragraph of the complaint.

In the third paragraph of their complaint, the appellees alleged, that the appellant made certain mistakes, which were specifically pointed out, in his final settlement of said estate. In said section 116 of the decedents' estates' act, above quoted, it is provided that a final settlement may be set aside for mistake. The allegations of this third paragraph were sufficient, we think, under the statute, and the demurrer thereto was properly overruled.

There is no bill of exceptions in the record, and therefore the alleged error of the court, in overruling the appellant's motion for a new trial, presents no question for our decision.

What we have said in considering the sufficiency of the several paragraphs of the complaint also disposes of the alleged error of the court in overruling the motion in arrest of judgment; for if, as we hold, the several paragraphs of the complaint were sufficient, on the appellant's demurrer thereto for the want of facts, it is clear that his motion in arrest of judgment was properly overruled.

The judgment is affirmed, at the appellants' costs.

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Swain v. Hardin et al.

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## SWAIN v. HARDIN ET AL.

**DESCENTS.—Surviving Second Wife without Issue.—Life-Estate.—Value of, on Partition Sale**—Where a husband dies leaving children by a deceased former wife, and also a surviving second wife without issue, she is entitled, on a sale of his lands in a partition proceeding, to one-third of the proceeds of such sale after payment of costs, reduced to a sum equal to the value of her life-estate.

**SUPREME COURT.—Judgment exceeding Finding.**—A party can not be heard to complain in the Supreme Court, that judgment was rendered in his favor by the lower court, for an amount exceeding that found by the court to be due him.

From the Madison Circuit Court.

*H. D. Thompson*, for appellant.

*W. R. Pierse*, for appellees.

**WORDEN, J.**—This was a complaint by the appellant, against the appellees, for the partition of certain real estate.

The plaintiff was the surviving second wife, without issue, of John T. Swain, who died seized of the land sought to be parted, and the defendants were the children and heirs at law of John T. Swain by a former wife.

The plaintiff was only entitled to, and only claimed, one-third of the land for life, and not in fee.

The commissioners appointed to make partition reported that the land could not be parted without injury to the owners, and a sale was ordered, made, reported to the court, and confirmed.

The gross proceeds of the sale amounted to five thousand and sixty-four dollars, but, deducting the costs in the partition proceeding, two hundred and twenty-one dollars, there was left four thousand eight hundred and forty-three dollars.

The only question presented in the case is as to what portion of this money the plaintiff was entitled.

As we understand the brief of counsel for the appellant,

64	85
125	598
64	85
134	197
64	85
141	224
64	85
153	67

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*Swain v. Hardin et al.*

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it is claimed that the appellant was entitled to her proper share of the five thousand and sixty-four dollars, undiminished by the costs of the proceedings, and that the costs should be paid out of the shares of the money going to the defendants.

We see no reason for such discrimination in favor of the appellant. The plaintiff and defendants were tenants in common of the land, the plaintiff having an estate for life in one-third thereof, and the defendants having the fee, subject to the plaintiff's life-estate in the third. Either party had the right to institute proceedings for partition. When the proceedings for that purpose resulted in a sale of the land, it seems to us to have been entirely proper to pay the costs of the proceedings out of the proceeds of the sale, and to divide the net proceeds among the parties according to their respective shares. This was done, and in so doing no error was committed.

One-third of the net proceeds of the sale was one thousand six hundred and fourteen dollars and thirty-three cents, and this entire sum the appellant contends should have been paid to her as her share of the net proceeds.

She would have been entitled to this entire sum, if she had been the owner of one-third of the land in fee.

But as she only owned a life-estate in one-third of the land, she was only entitled to such portion of the net proceeds of the sale of that third as the value of her life-estate bore to the value of the entire estate in that third. This the court found to be one thousand and ninety dollars and fifteen cents. This is the amount found for the appellant, as shown by a bill of exceptions. There is a discrepancy between the amount thus found and the judgment of the court. By the judgment, the appellant was awarded, as her share of the money, the sum of one thousand one hundred dollars and seventeen cents, but she can not complain of this clerical error, if it was such, it being in her favor.

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The State, *ex rel.* Raab *et al.*, v. Steinmeier *et al.*

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We do not understand the appellant as complaining of the amount adjudged to her, unless she was entitled to the entire third of the net proceeds of the sale. There is no principle of law that could entitle her to the entire proceeds of one-third of the land, when she had only a life-estate in that third.

It may be observed, that the case of *Small v. Roberts*, 51 Ind. 281, was a case in which the widow was entitled to one-third of the land in fee. She inherited the third of the land from her former husband, and during her second marriage her hands were tied up so that she could not alienate it. The fee continued in her nevertheless. During the second marriage, the land was sold on proceedings for partition; and it was held that she was entitled to one-third of the proceeds unconditionally. This was because she owned the fee in the third, though during her second marriage she was prohibited by the statute from alienating it. There is no conflict between that case and the decision herein.

There is no error in the record.

The judgment below is affirmed, with costs.

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THE STATE, EX REL. RAAB ET AL., v. STEINMEIER ET AL.

SUPREME COURT.—*Record.*—*Evidence.*—*Judgment.*—*Execution.*—*Motion to Distribute Moneys realized on Execution.*—*Presumption.*—A judgment in favor of the State, on behalf of several relators, having been rendered by a certain circuit court, against a certain defendant, and several separate executions issued thereon having been returned by the sheriff, one of such relators moved the court in writing for a distribution of money alleged to have been realized on such executions, to which motion the other relators answered, and the motion was denied, to which exception was reserved.

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*The State, ex rel. Raab et al., v. Steinmeier et al.*

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*Held*, by the Supreme Court, the record containing only such motion, the ruling thereon, and the exception thereto, that the ruling is presumed to be right.

*Held*, also, that such judgment and executions, never having been offered in evidence, form no part of the record.

From the Marion Circuit Court.

*P. Rappaport*, for appellants.

*N. B. Taylor, F. Rand and E. Taylor*, for appellees.

BIDDLE, J.—It appears by the transcript before us, in this case, that the State of Indiana, on the relation of Sebastian Raab and others, recovered a judgment in the lower court, against Charles W. Steinmeier and others, for the sum of two thousand five hundred and seventy dollars and ninety-seven cents. From this judgment no appeal was taken. It appears also that certain writs of execution were issued upon the judgment, and delivered to the sheriff, upon which he made his returns.

Subsequently, on the 30th day of May, 1876, the appellant filed a written motion before the court, asking "for a distribution of the proceeds arising from the sale of the lands made under the judgment."

To this motion the appellees filed a written answer.

The court overruled the motion; the appellant excepted and appealed.

A bill of exceptions was filed by the appellant, but all it contains is the written motion, that the court overruled it, and that the appellant excepted.

It does not appear what evidence the court heard under the motion, or whether any or not.

The appellant seems to go upon the ground that the whole record of the original suit, the executions and the sheriff's returns thereon, were before the court as evidence, without being offered or received.

In this we think the appellant is mistaken. After the final judgment in the original case, the record was no longer before the court, unless brought before it by some

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legitimate means. The court could not know, *ex officio*, what was in the record, what the judgment was, whether writs of executions had ever been issued upon it or not, nor what were the sheriff's returns thereon. The bare motion in writing of the appellant will not authorize the relief prayed for.

It may be that the record, judgment, executions and returns were all before the court, the case fully heard, and rightly adjudged; or it may be, as far as we are informed, that no evidence at all was introduced.

In either case, we must presume that the court was right.

The judgment is affirmed, at the costs of the relator.

Petition for a rehearing overruled.

COON v. VAUGHN.

**MALPRACTICE.**—*Complaint against Physician.—Tort.—Contract.—Contributory Negligence.*—In an action against a physician, for malpractice, the complaint alleged that the defendant had undertaken, on promise of compensation, to perform certain duties in the line of his profession, for the plaintiff, in treating him for a wound; but that the defendant had both neglected to perform such duties professionally and had performed them in an improper manner, resulting in a permanent physical injury to the plaintiff.

*Held*, on demurrer for insufficiency, that the action, though sounding in tort, is founded upon a contract, and that the complaint need not aver a want of negligence on the part of the plaintiff.

From the Kosciusko Circuit Court.

A. G. Wood, — Piper, L. H. Haymond, — Royse, J. S. Frazer and W. D. Frazer, for appellant.

W. S. Marshall and J. H. Carpenter, for appellee.

BIDDLE, J.—The following is the complaint of the appellee against the appellant:

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126	361
64	89
126	431



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"James M. Vaughn complains of Moses J. Coon, and says, that, on the — day of February, 1873, from a fall down and off a pair of stairs, he broke his right leg above the knee, and also greatly bruised and injured his leg and body; and the defendant, then being a practising physician and surgeon, as such, in consideration of a reasonable reward to be thereafter paid to him by the plaintiff, the said defendant then and there being in the practice of medicine and surgery, undertook and promised the plaintiff faithfully, skilfully and diligently to treat and set said broken limb, and to endeavor to cure and heal the same, and also to cure and heal the bruises on the plaintiff's body. But plaintiff avers, that, on the contrary thereof, the said defendant conducted himself in and about his endeavoring to set said limb, and in and about curing and healing said limb and body, so unskilfully, negligently, and unprofessionally, that, by reason of the improper treatment and unskilful and negligent conduct of the defendant, said broken limb was not set, nor said limb and body healed and cured, but said limb was permitted to remain unset and out of place for the space of eight weeks, until it became impossible to properly set the same; whereby the plaintiff, during all said time aforesaid, was compelled to and did suffer great bodily pain, and has wholly lost the use of said limb. Wherefore he demands judgment," etc.

The second paragraph of the complaint is not essentially different from the first.

A demurrer to each paragraph of the complaint, for the alleged want of sufficient facts, was overruled, and exceptions to the ruling reserved.

Answer; issue; trial; verdict for appellee; judgment; appeal.

The questions presented to this court arise upon the rulings on the demurrers to the complaint, upon giving certain instructions, and the sufficiency of the evidence to support the verdict.

The objection to the complaint is, that it contains no averment that the wrong complained of was done by the appellant without the fault or negligence of the appellee. In the cases of *Peck v. Martin*, 17 Ind. 115, and *Scudder v. Crossan*, 43 Ind. 348, a complaint similar to the one before us was held good, without containing any direct averment that the plaintiff was without fault. Such an averment is necessary only in cases where the question is one solely of negligence, without any direct, positive, affirmative fault on the part of defendant.

In the case of *Roll v. The City of Indianapolis*, 52 Ind. 547, wherein the city was charged with the wrongful establishment of an insufficient sewer and certain catch-basins, and improperly turning certain drainage into them, whereby the plaintiff was injured in his property, it was held that no such averment was necessary, the court, in the course of the opinion, remarking, that:—

“In cases of trespass, and where the wrong complained of is committed by some positive, affirmative act, the negation of fault or negligence on the part of the plaintiff is not necessary.”

In the case before us, the complaint avers, that defendant, being a physician and surgeon, undertook, for a reward or hire, to perform certain duties in the line of his profession; that he performed them in an improper way, as well as neglected to perform them as he ought to have done.

In such a case, we do not think the negation of negligence on the part of the plaintiff is necessary. Indeed, the undertaking, though sounding in tort, is founded in contract—to do a certain thing upon a consideration—and the breaches are alleged.

In the approved forms, we find no trace of such an averment; 1 Abbott's Forms, 361, 362; 2 Chitty Pleading, 16th Am. ed., 607; nor in any of the cases of malpractice, against surgeons, decided by this court; *Long v. Morrison*, 14 Ind.

*Couch et al. v. The First National Bank of Thorntown, Indiana.*

595; *Gramm v. Boener*, 56 Ind. 497, and cases above cited.

The complaint, in our opinion, is good.

The appellant has pointed out no objections to the instructions, and we see none.

There is no such defect or weakness in the evidence as will authorize us—being an appellate court—to disturb the verdict.

The judgment is affirmed, at the costs of the appellant.

Petition for a rehearing overruled.

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148 113

COUCH ET AL. v. THE FIRST NATIONAL BANK OF THORNTOWN, INDIANA.

**PROMISSORY NOTE.**—*Complaint against Endorser.*—*Insolvency of Maker.*—*Demand.*—*Time.*—*Misjoinder of Parties.*—*Dismissal as to Maker.*—*Evidence.*—In an action by an assignee, against the maker and endorser, on a promissory note not payable in bank, commenced on the second day after its maturity, the complaint alleged that the maker then was, and long prior thereto had been, wholly and notoriously insolvent.

*Held*, on demurrer by the endorser, that the complaint is sufficient, that no demand upon him was necessary, and that the action was brought in time. *Held*, also, that the maker and endorser can not be joined in the same action unless the endorser be liable without suit having been first brought against the maker.

*Held*, also, that the dismissal of the action against the maker was proper.

*Held*, also, the endorser having pleaded the general denial, that such dismissal did not relieve the plaintiff of establishing the insolvency of the maker.

From the Boone Circuit Court.

*O. S. Hamilton and F. M. Charlton*, for appellants.

**WORDEN, J.**—This was an action by the appellee, against the appellants.

James Davis was originally made a defendant, but during the progress of the cause the suit was dismissed by the plaintiff, as against him.

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*Couch et al. v. The First National Bank of Thorntown, Indiana,*

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The action was brought upon two promissory notes, each executed on November 11th, 1874, for the sum of seven hundred and fifty dollars, and payable December 25th, 1876.

James Davis was the maker of each of the notes. One was payable to the order of A. J. Davis, one of the appellants, and was by him and the other appellant, Couch, endorsed in blank to the plaintiff.

The other was payable to the order of Couch, and was by him and A. J. Davis endorsed in blank to the plaintiff. It thus appears that the appellants were joint endorers of each of the notes.

The action appears to have been brought immediately upon the maturity of the notes.

It is alleged in each paragraph of the complaint, based upon each of the notes, that the maker, James Davis, then was, and for a long time theretofore had been, wholly and notoriously insolvent.

The appellants herein filed a demurrer to the complaint, for want of sufficient facts, but it was overruled, and exception was taken. They then answered by general denial.

At this point the action was dismissed, as to the maker of the notes.

The cause was submitted to the court for trial, and there was a finding and judgment for the plaintiff, against the appellants.

The appellants have assigned several supposed errors, but there is no question properly preserved and presented by the record, except that arising upon the overruling of the demurrer to the complaint.

The complaint seems to us to have been in all respects good. The notes were not governed by the law merchant, not being payable at a bank in this State, and therefore no demand or notice of non-payment was necessary to fix the liability of the appellants as endorers.

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The endorsee of such notes, however, is required to use due diligence to collect them of the maker, before he can proceed against the endorser, or to show a good reason for not doing so. Ordinarily, if the maker of the note has no defence to it, and lives in this State, and has property therein subject to execution, out of which the debt or some part of it could be made, the endorsee of such note is required with due diligence to sue the maker and take out his execution, and thereby make what he can out of the property of the maker, before he can sue the endorser. But the law does not require a useless thing.

Where the maker is wholly and notoriously insolvent, as is averred in this case, it would be useless for the holder to sue him; nor does the law require that he should, before suing the endorser.

There are many cases upon this point, but it will be sufficient to refer to one only, *Reynolds v. Jones*, 19 Ind. 123.

It may be observed, that the plaintiff was guilty of no laches in delaying suit against the maker. This action was commenced on the second day after the maturity of the notes. If at that time the maker was wholly and notoriously insolvent, the plaintiff had the right at once to sue the endorsers, without bringing any action against the maker.

The demurrer to the complaint was properly overruled.

But the appellants complain of the dismissal of the cause as against the maker of the notes. This, it may be observed, was done at the costs of the plaintiff. The appellants took no exception in this respect, but, as the point is perhaps novel, we have thought proper to consider it.

The counsel for the appellants say, that "The plaintiff, voluntarily and without the consent of parties, dismissed the action as to James Davis, the maker of the notes sued on, thus relieving them from the necessity of proving the

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insolvency of said maker, as he was no longer a party to the suit."

If the dismissal of the case, as to the maker, worked such disastrous results to the endorsers, the right of the plaintiff to enter such dismissal ought to be carefully considered. But how, it may be asked, did the dismissal relieve the plaintiff from the necessity of proving the insolvency of the maker, in order to hold the endorsers liable? That proof had to be made, under the the issue joined, as against the endorsers, in order to hold them liable, whether the maker was or was not a party to the suit. The dismissal of the suit against the maker did not add to or diminish the proof necessary to be made in order to hold the endorsers.

The statute provides, that "The holder of any note or bill of exchange, negotiable by the law merchant, or by law of this State, may institute one suit against the whole or any number of the parties liable to such holder, but shall not, at the same term of court, institute more than one suit on such note or bill," etc. 1 R. S. 1876, p. 637, sec. 16.

The notes were negotiable by the law of this State. The appellants were jointly liable to the plaintiff as one of the parties to the notes, being endorsers thereof, because of the insolvency of the maker. The maker was liable in his capacity as maker. The case, therefore, was one in which the action might be brought against the maker as one party, and the endorsers as another party, liable to the holder on the note. It would seem that makers and endorsers could not be joined in an action, except in cases where the endorsers are liable without a suit having been first brought against the makers. See *Mix v. The State Bank*, 13 Ind. 521.

The plaintiff might have sued the endorsers without joining the maker, and, having joined him, it had a right to dismiss as to him at its option.

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Galvin *et ux.* v. The State, *ex rel.* Hedges.

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The evidence is not in the record, and no further question arises in the cause.

The judgment below is affirmed, with costs.

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GALVIN ET UX. v. THE STATE, EX REL. HEDGES.

**PRACTICE.**—*Motion to Strike out Parts of Complaint.*—*How Error Rendered Harmless.*—*Evidence.*—Error in overruling a motion to strike out parts of a complaint may be rendered harmless by objecting to the admission of evidence sustaining the improper allegations.

**SAME.**—*Motion for New Trial.*—A motion for a new trial on the ground of the admission of incompetent or illegal evidence should clearly designate such evidence.

From the Boone Circuit Court.

C. S. Wesner, C. C. Galvin and S. E. Perkins, Jr., for appellants.

PERKINS, J.—This was a suit by the State, on the relation of the auditor of Boone County, Indiana, commenced on the 26th day of July, 1875, to foreclose a mortgage on certain real estate, executed by Elisha Wall and wife, in 1853, to the State of Indiana, to secure a loan from the school fund apportioned to Boone county, Indiana.

A motion to strike out parts of the complaint was overruled, and exceptions entered.

A demurrer to the complaint, for want of facts, was overruled, and exception entered.

Answer in three paragraphs:

1. General denial;
2. Statute of limitations; and,
3. Payment.

Reply to the second and third paragraphs of answer, by the general denial.

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Cause submitted to the court for trial ; finding and judgment for the plaintiff.

A motion for a new trial, for the following causes, was overruled, viz.:

- "1. The finding of the court is contrary to law.
- "2. The finding of the court is contrary to the evidence ;
- "3. The finding of the court is not sustained by competent evidence ; and,
- "4. Error of the court in admitting, over defendants' objections, incompetent and illegal evidence."

The errors assigned in this case are :

1. Overruling the motion to strike out parts of the complaint ;
2. Overruling the demurrer to the complaint ; and,
3. Overruling the motion for a new trial.

We consider the errors assigned :

1. The overruling of the motion to strike out parts of the complaint, if erroneous, was a harmless error. Injury could have been prevented, by objections to the admission of improper evidence on the trial. *The City of Crawfordsville v. Brundage*, 57 Ind. 262 ; *Brinkmeyer v. Helbling*, 57 Ind. 435.

2. It was not error to overrule the demurrer to the complaint. It was sufficient.

3. The court did not err in overruling the motion for a new trial for the causes, assigned in the motion, which are set out above.

The finding of the court was not contrary to law ; it was not contrary to the evidence ; it was sustained by competent evidence. The incompetent, illegal evidence, alleged to have been admitted, is not pointed out.

The judgment is affirmed, with costs.

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Wilkinson et al. v. Applegate.

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WILKINSON ET AL. v. APPLGATE.

**PLEADING.**—*Complaint for Overflowing Lands.*—*License.*—*Defence.*—In an action against an adjoining proprietor, to recover damages for overflowing the lands of the plaintiff by means of a ditch constructed by the defendant on his own land, the complaint need not aver that such act of the defendant was wrongful and unlawful or without license; as the fact that his act was rightful and lawful, or one which he had license to do, is matter of defence.

Howk, C. J., and NIBLACK, J., dissented.

**INSTRUCTION.**—*Supreme Court.*—Where, on appeal to the Supreme Court, the evidence is not in the record, the Supreme Court will presume that the instructions to the jury, if not abstractly wrong, were properly given.

From the Hamilton Circuit Court.

T. J. Kane and T. P. Davis, for appellants.

Howk, C. J.—In this action the appellee sued the appellants, in a complaint of a single paragraph, wherein he alleged, in substance, that he was the owner and in the possession of certain real estate, particularly described, in Hamilton county, Indiana; that, prior to the grievances stated in said complaint, the said real estate was of a most excellent quality, with a highly fertile soil, and in a fine state of cultivation; that the appellants were the owners of a certain tract of land adjoining the appellee's real estate on the north; that the appellants dug, and caused to be dug and constructed, a certain ditch through the appellants' said tract of land, in such a manner as to flow vast quantities of water over and upon the appellee's said real estate, and overflow twenty-five acres thereof and wash the soil off, and cause large ponds of water to stand on said real estate, thereby destroying its fertility, and rendering said real estate of no value whatever; to the appellee's damage in the sum of one thousand dollars, for which, and for other proper relief, he demanded judgment.

The appellants' demurrer to this complaint, for the alleged insufficiency of the facts therein to constitute a cause

of action, was overruled by the court, and to this decision they excepted.

The appellants answered in two paragraphs:

1. A general denial; and,
2. License from the former owners of the appellee's real estate, from whom he derived his title, to cut the ditches, and drain and flow the water, as alleged in the complaint.

To the second paragraph of the answer, the appellee replied in two paragraphs, the first being a general denial, and the second being a special reply, which, on the appellants' motion, the court struck out as a departure.

The issues joined were tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of one hundred dollars,

The appellants' motion for a new trial was overruled, and to this ruling they excepted, and judgment was rendered on the verdict.

In this court, the appellants assigned as errors the following decisions of the circuit court:

1. In overruling the demurrer to appellee's complaint;
2. In overruling their motion for a new trial.

The appellants' objections to the sufficiency of the complaint are, that it was not alleged that the matters therein stated were done wrongfully and unlawfully by the appellants, or without the appellee's license or express permission. The majority of this court hold, that these objections are not well taken; that, if the alleged acts of the appellants, complained of by the appellee, were right and lawful, or were done by the appellee's license and express permission, these were matters of defence, to be shown by the appellants in their answer or by their evidence on the trial; and that the complaint was good, on the demurrer thereto for the want of sufficient facts.

The writer does not concur in this opinion. He believes

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Riggs v. Fisk.

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that the appellee should have shown, by the allegations of his complaint, that the acts of the appellants on their own land, complained of by him as having caused injuries to his land, were wrongful and unlawful; and that, for the want of such an allegation, the appellee's complaint was bad, on the demurrer thereto for the want of sufficient facts. In this view of the insufficiency of the complaint, on the appellants' demurrer thereto, NIBLACK, J., concurs.

Among the causes for a new trial, assigned by the appellants in their motion therefor, was alleged error of law committed by the court, in giving the jury instructions numbered six and seven.

The evidence is not in the record. While the instructions complained of were not so full, clear and explicit as we think they ought to have been, yet we are not prepared to say, in the absence of the evidence, that they were erroneous, as mere abstract legal propositions. There is nothing in the record which shows that the court erred in overruling the appellants' motion for a new trial.

The judgment is affirmed, at the appellants' costs.

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RIGGS v. FISK.

*INFANT.—Conveyance during Infancy.—Disaffirmance by Conveyance at Majority.—Adverse Possession.—Action to Recover Real Estate.*—A conveyance, made by a grantor on attaining the age of twenty-one years, of lands adversely held by one claiming title thereto under a conveyance made by the same grantor during his infancy, is void as against the adverse holder, but operates as a disaffirmance of the first deed, and authorizes the grantee thereunder to sue the adverse holder, in the name of the grantor, for the recovery of such lands.

*SAME.—Entry.*—If, by entry or otherwise, prior to the making of such second conveyance, such grantor has obtained possession of such lands, such conveyance is effectual for all purposes.

From the Vigo Circuit Court.

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Riggs v. Fisk.

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*J. C. Briggs, S. B. Davis and S. C. Davis*, for appellant.  
*J. G. Williams*, for appellee.

NIBLACK, J.—This was an action, by John Riggs, against Samuel E. K. Fisk, for the recovery of the possession of a tract of land lying in Vigo county, estimated to contain ten acres.

The complaint was in the usual form. The defendant answered in general denial.

The cause was submitted to the court for trial, upon an agreed statement of facts, which may be summarized as follows :

Welthy A. Bailey, being a married woman, was, on the 27th day of May, 1871, the owner of the tract of land in controversy ; and, on that day, with her husband, Willis R. Bailey, conveyed said land by warranty deed, duly acknowledged and recorded, to one James R. Ernest ; that said Ernest paid the purchase-money, and went into possession under said deed, claiming title to the land, and remained in possession until his death ; that, since the death of Ernest, the defendant, Fisk, has been in possession of said land as his residuary devisee, and has since remained, and still remains, in possession as such devisee ; that, at the time the deed to Ernest was made, Mrs. Bailey was a minor under the age of twenty-one years ; that, after arriving at the age of twenty-one years, to wit, on the 3d day of September, 1873, the said Welthy A. Bailey and her said husband executed and delivered to the plaintiff, Riggs, a warranty deed for the land in suit, which deed was also duly acknowledged and recorded ; that, on the 4th day of August, 1873, the said Welthy A. Bailey instituted a suit in the Vigo Circuit Court, against the said Ernest, to recover the land sued for in this action, but that said suit was afterward, on the 25th day of October, 1874, dismissed without judgment or prejudice to the rights of either party ; that, on the 8th day of May, 1874, the said Welthy A. Bailey and her husband attempted, by quitclaim deed, duly exe-

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cuted and acknowledged, to convey the same land to the said Ernest, but by mistake the land was not properly described in such deed; that the plaintiff has never been in the possession of the land concerning which this suit is prosecuted, but has demanded possession of it before this suit was commenced, both from the said Ernest and the defendant, and was refused such possession by both Ernest and the defendant; that the said Ernest paid to Mrs. Bailey twenty dollars for said quitclaim deed, and that she did not claim to have any title to the land attempted to be conveyed by such quitclaim deed, when it was executed; that neither Mrs. Bailey nor her husband, nor any one else for either of them, has ever refunded any of the purchase-money paid by the said Ernest, and that the plaintiff paid to Mrs. Bailey the full amount of the purchase-money agreed to be paid by him, none of which has ever been refunded.

Upon these facts, the court found for the defendant, and, after overruling a motion for a new trial, rendered a judgment in his favor, upon the finding.

The only error assigned is upon the overruling of the motion for a new trial.

It has been decided by this court, in the very carefully considered case of *Pitcher v. Laycock*, 7 Ind. 398, upon what we regard as amply sufficient authority, that an infant's conveyance of land may be disaffirmed, on his attaining his majority, without entry, by conveying the land to another person, and that it is not necessary to return the purchase-money to make such disaffirmance effectual.

In *Parsons on Contracts*, 6th ed., vol. 1, p. 328, it is said, and we think correctly, that, "If any act of disaffirmance is necessary to enable an infant after attaining his majority to avoid his conveyance made while a minor, it is now well settled that the execution of a second deed, which is inconsistent with the former deed, is itself a disaffirmance of the former deed, although the infant had not

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previously manifested any intention to avoid it and had made no entry upon the premises conveyed. The old rule, requiring such entry before the infant could make another conveyance, has long since been done away."

But we are of the opinion, that, to make a second deed, executed as above indicated, effectual for all purposes as a conveyance, the grantor must, at the time of its execution, be either in the actual or constructive possession of the premises conveyed by it.

In Parsons, *supra*, it is further said, in connection with what is quoted as above, that "In some of our States, however, a sale of lands can be made only by one in possession; and in that case the infant should enter before making his conveyance."

By this, as applicable to cases in this State similar to the one before us, we understand the author to mean, that, where lands conveyed by a minor are in the adverse possession of some one else, whether under his deed or otherwise, when he arrives at full age, he must first obtain, by entry or other proper proceedings, the possession of such lands before he can make a second deed that will be effectual to put the grantee into possession.

Thus construed, we regard the rule lastly as above laid down by Parsons, as being a correct and safe one for us to follow, as applicable to the case at bar.

But, while a second deed, made by a minor after he arrives at full age, will not be operative as against a third person in adverse possession, it is still good between the parties, and as to all the rest of the world, except the person in such adverse possession. 4 Kent Commentaries, p. 448; *Steeple v. Downing*, 60 Ind. 478.

While such a deed is void as to third persons in adverse possession, it nevertheless authorizes the grantee to prosecute a suit in the name of the grantor, for the recovery of the premises conveyed for the benefit of the grantee *Steeple v. Downing, supra*.

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Tillman v. Kircher.

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Although such second deed of the late minor may be thus void as to some third person in the adverse possession of the land conveyed, we have come to the conclusion, and accordingly hold, that such a conveyance operates as a disaffirmance of the first deed made during the grantor's minority.

Owing, however, to the adverse possession of Ernest at the time Mrs. Bailey conveyed to the plaintiff, there was no error in the decision of the court below.

The judgment is affirmed, with costs.



64	104
145	141
145	573

#### TILLMAN v. KIRCHER.

**DITCHES AND DRAINS.—Action on Assessment.—Evidence.**—Where, in an action to collect an assessment for the construction of a drain petitioned for after the taking effect of the act of March 9th, 1875, 1 R. S. 1876, p. 428, neither the petition, the finding of the board of commissioners, nor any evidence showing that the drain was necessary and conducive to the public health, convenience or welfare, or of public benefit or utility, is introduced, the finding should be for the defendant.

From the Wabash Circuit Court.

*M. H. Kidd, A. C. Downey and H. S. Downey*, for appellant.

**BIDDLE, J.**—Action by the appellant, against the appellee, to collect an assessment made for constructing a drain.

The proceedings to establish the drain were commenced in June, 1876, after the act of March 9th, 1875, 1 R. S. 1876, p. 428, had taken effect. Sections 1 and 4 of that act declare that any drain, to be established under the act, shall be necessary and conducive to public health, convenience or welfare, or of public benefit or utility.

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The case was tried by the court; finding and judgment for the appellee.

We think the court was right. Neither the petition, nor the finding of the board of commissioners, nor any averment in the case, nor any evidence tending to prove that the drain is necessary and conducive to public health, convenience or welfare, or of public benefit or utility, is shown in any part of the proceedings. The Legislature can not constitutionally enact any law authorizing one person to improve the lands of another, by draining or otherwise, and compel the person benefited to pay to the other person the assessment therefor, unless the public, also, is in some way benefited thereby, as that the improvement is necessary and conducive to the public health, convenience or welfare, or of public benefit or utility; and then it can be done only by due course of law.

The general principle governing local assessments, or local taxation, was well expressed by PERKINS, J., in the case of *Anderson v. The Kerns Draining Company*, 14 Ind. 199, in the following words:

"But the draining of a man's farm, simply to render it more valuable to the owner, would not be a work of public utility, in the constitutional sense of the term; and a corporation organized and acting for such a purpose, would be no more acting in a public undertaking, than would a company organized and acting for the clearing up of men's farms and putting them in a better state of cultivation than the proprietors were willing to do, though the public and adjoining proprietors might be, in a substantial degree, benefited by the operation. And forcible taxation to pay for the benefit would hardly be tolerated." See, also, *McKinsey v. Bowman*, 58 Ind. 88.

The judgment is affirmed, at the costs of the appellant.



Terry v. Shively.

## TERRY v. SHIVELY.

64	106
125	82
64	106
136	696
64	106
139	408

**INSTRUCTION.—Facts Outside the Issues.**—An instruction to a jury, authorizing them to consider matters foreign to the issues, is erroneous.

**SAME.—Action on Account, for Value of Chattels.—Recovery for Cash Paid.—Settlement.—Former Adjudication.—Payment.—Evidence.**—In an action on an account for personal property sold and delivered, wherein the defendant answered the general denial, settlement, former adjudication and payment, and the plaintiff replied the general denial, the court instructed the jury, that, in arriving at a verdict, they might consider, on behalf of the plaintiff, any payments made by him on a certain judgment theretofore recovered against him by the defendant.

*Held*, that the instruction was erroneous.

*Held*, also, that evidence of such payments was inadmissible under the issues.

**SAME.—Instruction Ignoring Defence.**—Where, in such action, there was evidence tending to sustain each of such special defences, an instruction to the jury, limiting their attention and the defendant's right to recover to one only of these defences, is erroneous.

**SAME.—Instruction as to Settlement.**—An instruction in such action, that, to entitle the defendant to recover on the alleged settlement, he must have established, that, on such settlement, a balance remained due to him, is erroneous.

**SAME.—Promissory Note Executed on Settlement.—Legal Effect of.**—The paragraph of defence alleging settlement, having also alleged that the plaintiff had executed his promissory note to the defendant for the balance due on settlement, it was error to instruct the jury to determine the legal effect of such note, that being a question of law solely for the court.

From the Fulton Circuit Court.

*J. S. Slick and J. S. Frazer*, for appellant.

*D. Turpie and H. D. Pierce*, for appellee.

**Howk, C. J.**—This was a suit by the appellee, as plaintiff, against the appellant, as defendant, upon an open account for lumber sold and delivered by the appellee to the appellant.

In his complaint, the appellee alleged, in substance, that the appellant was indebted to him in the sum of twelve hundred and twenty dollars for lumber sold and delivered by the appellee to the appellant, the particulars of which

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were set forth in an account filed with and made part of said complaint, and that the said account remained wholly unpaid, and was then due the appellee from the appellant; and judgment was demanded for fifteen hundred dollars, and for other proper relief. An itemized bill of particulars was filed with the complaint.

To this complaint the appellant answered in four paragraphs, the first being a general denial, and each of the other paragraphs setting up affirmative matters, by way of defence, which we need not now notice.

To the affirmative paragraphs of the answer, the appellee replied by a general denial. The issues joined were tried by a jury, and a general verdict was returned for the appellee, assessing his damages in the sum of two hundred and sixteen dollars.

With their general verdict, the jury also returned into court their special findings on particular questions of fact, submitted to them by the appellant under the direction of the court, as follows :

"1st. Do you find, that, on the 15th of July, 1874, the plaintiff and defendant had a settlement of all lumber transactions, had between them up to that date?"

Ans. "No."

"2d. If you answer the first interrogatory in the affirmative, then did the plaintiff execute his note to the defendant for the sum then understood to be due?"

Ans. "Yes."

"3d. If you answer the second interrogatory in the affirmative, then do you find, that, after the note had been so executed by plaintiff to the defendant, plaintiff made a partial payment or partial payments thereon, without objection or protest?"

Ans. "Yes."

"4th. Was all the lumber, delivered by the plaintiff to

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the defendant, paid for before delivery, by advancements of money made by defendant to plaintiff?"

Ans. "No."

The appellant moved the court, in writing, for a judgment in his favor, on the special findings of facts, for the reason that the same were inconsistent with the general verdict, which motion was overruled, and to this ruling he excepted.

His motion for a new trial was overruled by the court, and his exception to this decision was duly entered. His motion in arrest of judgment was also overruled by the court, and his exception to this ruling was duly saved; and the court rendered judgment on the general verdict, from which judgment he appealed to this court.

The following alleged errors have been assigned by the appellant, in this court:

"1st. The complaint does not state facts sufficient to constitute a cause of action;

"2d. The court erred in overruling the appellant's motion for a new trial;

"3d. The court erred in overruling the appellant's motion for the taxation of costs to the plaintiff; and,

"4th. The court erred in overruling the appellant's motion in arrest of judgment."

The first and fourth of these alleged errors might properly be considered together, as they each call in question, to a limited extent, the sufficiency of the appellee's complaint—the fourth, after trial and verdict in the circuit court, and the first, after judgment and appeal therefrom—for the first time in this court. But these errors, if they existed, have been expressly waived by the appellant's counsel in their brief of this cause.

In the appellant's motion for a new trial, the following alleged causes therefor were assigned:

1. Misconduct of the jury, in this, that each of the ju-

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rors stated the sum which, in his opinion, the plaintiff should recover; said sums were then added together, and the aggregate was divided by twelve, and the quotient was taken as the verdict;

2. For error in the assessment of the amount of recovery, the same being too large;

3. The verdict of the jury was contrary to law;

4. The verdict of the jury was not sustained by sufficient evidence;

5. The court erred in giving the jury instructions numbered 3, 4, 5, 6, 7, 8, 10 and 11, which were excepted to at the time by the appellant;

6. The court erred in refusing to give the jury instructions numbered 13 and 14, offered by the appellant, to which refusal he excepted at the time; and,

7. The court erred in overruling the appellant's motion for judgment in his favor, on the special findings of the jury.

The appellant's attorneys have expressly waived, in their argument of this cause, the first, second and seventh of these causes for a new trial, thus leaving, for our consideration and decision, such questions only as may be fairly presented under the third, fourth, fifth and sixth of the alleged causes for a new trial.

Before considering the alleged error of the court, in giving the jury the instructions complained of, it is proper that we should state the substance of the affirmative paragraphs of the appellant's answer.

The first paragraph of the answer, as we have said, was a general denial of the complaint.

In the second paragraph, the appellant alleged, in substance, that, on the 15th day of July, 1874, he and the appellee had a settlement of all accounts and matters then between them, and had since that time had no dealings; and that, at the time of said settlement, the appellee ac-

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knowledge that he owed the appellant the sum of five hundred and ten dollars and thirty-seven cents, and made his note for that sum.

In the third paragraph of his answer, the appellant set up that, at the May term, 1875, of the Kosciusko Circuit Court, in a suit wherein he was plaintiff, and the appellee was defendant, all the matters in the complaint mentioned were adjudicated upon and finally adjusted, and that the appellee was estopped from setting them up in this action.

The third paragraph of appellant's answer was a general plea of payment in full of the account sued on in appellee's complaint, before the commencement of this action.

To the affirmative paragraphs of appellant's answer, the appellee's only reply, as we have seen, was a general denial thereof.

With this statement of the issues in the cause, we proceed to the consideration of the seventh instruction of the court to the jury, complained of by the appellant as erroneous. This instruction was as follows:

"7th. If you find, from the evidence, that the note was not given on settlement of accounts between the parties, and that the note is not conclusive as to the indebtedness of the plaintiff to the defendant, then you will determine the value of all the lumber which the plaintiff delivered to the defendant, which aggregate value will be the gross amount of the claim in favor of the plaintiff; and, on the other hand, you will take all the different sums of money proven to have been advanced by the defendant to the plaintiff, and from the aggregate of these money items should be deducted whatever sums of money you find to have been paid, if any, by the plaintiff to the defendant on the judgment, in the Kosciusko Circuit Court, and the difference will be the credit to which the defendant is entitled

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as an offset against the plaintiff's account for the value of the lumber, and the difference between such credit and the value of the lumber, as from the evidence you shall find it to be, will be the measure of your verdict."

There is more of this instruction, but we have set out the part thereof complained of by the appellant's counsel, and the remainder of the instruction does not change or modify the legal effect and purport of what we have set out. The chief objection to this instruction is, that it was not warranted or authorized by the issues in the cause. It instructed the jury, that, in arriving at their verdict, they must charge the appellant with certain money items, if proved to their satisfaction, although the appellee had not sued the appellant, in this action, for any such items of account. We think this objection is well taken. Possibly, the rule prescribed for the jury, by this instruction of the court, might have enabled them to reach a right result, if the real facts of the case had been pleaded, and the issues properly made. But the objection urged to the instruction is, that it is outside of the issues in the cause, and directs the jury to consider certain matters, in arriving at their verdict, which were not embraced in or shown by any of the pleadings. That far forth the instruction was clearly erroneous. In the trial of the cause, and in determining the proper verdict, both the court and jury were bound and limited by the allegations in the pleadings, and the issues thereby presented. "It would be folly to require the plaintiff to state his cause of action, and the defendant to disclose his grounds of defence, if, on the trial, either or both might abandon such grounds and recover upon others which are substantially different from those alleged." *Boardman v. Griffin*, 52 Ind. 101.

It seems to us, that the court erred, also, in this instruction, in submitting to the jury, as a question for their determination, the legal effect of the note mentioned in the second paragraph of the appellant's answer, as to whether

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it was or was not "conclusive as to the indebtedness of the plaintiff to the defendant." That was a question for the court, and it was error, we think, to submit it to the decision of the jury.

The appellant's counsel also complain in argument of the fifth instruction of the court to the jury. This instruction was very long, and we can not set it out in this opinion. In it the court explained to the jury the three affirmative paragraphs of the appellant's answer; and, after this explanation, the court instructed the jury as follows: "If you find from the evidence that the plaintiff delivered lumber to the defendant, as alleged in the complaint, then, in order to entitle the defendant to a verdict in this suit, he must have shown by a preponderance of evidence, that, previous to the commencement of this suit, a settlement was made between him and the plaintiff, and a balance found in his favor." The principal objection to this instruction is, that it entirely ignores two of the appellant's alleged defences to this action, to wit, former adjudication and payment. There was evidence before the jury tending to sustain each of these defences; and surely, if the jury had found either that there had been a former adjudication of the account sued on by the appellee, or that the appellant had fully paid said account before the commencement of this action, either finding would have been amply sufficient "to entitle the defendant to a verdict in this suit," and the court should have so instructed the jury, under the issues and evidence in this case. Then, again, it seems to us, that if the jury found from the evidence, that, before the commencement of this suit, a settlement had been made between the appellant and the appellee, it was not necessary, "in order to entitle the defendant to a verdict in this suit," that, upon such settlement, as the court instructed the jury, "a balance" should have been found in the appellant's favor. For if, upon such settlement, it appeared that the accounts between the

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parties were even, and that nothing was due to either party from the other, in such an event it is clear, we think, that the appellant would have been entitled to a verdict in this suit. In our opinion, the court erred in giving the jury this fifth instruction.

The appellant's attorneys complain of other instructions of the court; but, as the conclusions we have reached, in regard to the fifth and seventh instructions, will necessarily lead to a new trial of the cause, we think it unnecessary for us now to consider or decide any of the other questions presented by the record of this cause, and the errors assigned thereon. On a new trial of the cause, the probabilities are, that the issues may be changed, new evidence introduced, and other instructions given. In this view of the case, we think that nothing would be gained by a further consideration of the record and the errors assigned thereon.

For the reasons already given, we are clearly of the opinion, that the court erred in overruling the appellant's motion for a new trial.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

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THE LOUISVILLE, NEW ALBANY AND CHICAGO R. W. Co. v.  
BRECKENRIDGE.

**JUSTICE OF PEACE.**—*Verdict for Over Two Hundred Dollars.*—*Remittitur.*—*Jurisdiction.*—In an action originating before a justice of the peace, wherein the amount demanded was less than two hundred dollars, the jury trying the cause in the circuit court, on appeal, found a verdict for more than two hundred dollars, whereupon the party recovering remitted all damages in excess of the amount demanded, and judgment was rendered for the residue.



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*Held*, that the verdict did not oust jurisdiction, and that the remittitur and judgment were proper.

**RAILROAD.—Killing Stock.—Evidence.—Venue.—Jurisdiction.**—In an action under the statute, against a railroad company, for killing stock, the evidence must affirmatively show, either directly or by inference, that the stock was killed within the county where the action was brought.

From the White Circuit Court.

*A. W. Reynolds* and *E. W. Sellers*, for appellant.

**WORDEN, J.**—This was an action brought by the appellee, against the appellant, before a justice of the peace, to recover damages for the killing of animals by the engine and cars of the defendant upon its road, the same not being properly fenced.

The complaint before the justice alleged the value of the animals to be one hundred and ninety-nine dollars and ninety-nine cents, and claimed damages in that sum.

The plaintiff recovered before the justice, and the defendant appealed to the circuit court. In the latter court the cause was tried by a jury, who found a verdict for the plaintiff in the sum of two hundred and seven dollars, and the plaintiff having remitted all of the verdict, except one hundred and ninety-nine dollars and ninety-nine cents, judgment was rendered for the plaintiff for that amount.

The appellant objects that the court below had no jurisdiction, because the jury rendered a verdict for more than the amount of which the justice had jurisdiction, viz., two hundred dollars. The amount demanded before the justice furnished the criterion by which to determine his jurisdiction. *Pate v. Shafer*, 19 Ind. 173; *Mitchell v. Smith*, 24 Ind. 252. While the plaintiff could not recover, on appeal, more than the amount over which the justice had jurisdiction, yet the fact that the jury found a larger sum in his favor than he had demanded, and larger than the jurisdiction of the justice, does not render the proceeding void for want of jurisdiction.

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The plaintiff demanded a sum within the jurisdiction of the justice. The justice therefore had jurisdiction. The plaintiff could not, on appeal, recover more than the sum over which the justice had jurisdiction. The excess only of the verdict was void, and this was properly remitted, and judgment rendered only for the sum demanded.

Upon a motion for a new trial, two points were made, viz., that the evidence does not show that the animals were killed by the engine or cars of the defendant; and, second, that it does not appear that they were killed in White county.

We are inclined to the opinion that there was enough in the evidence to justify the inference that the animals were killed by the engine and cars of the defendant; but we do not find any evidence that they were killed in White county.

The only evidence as to venue was the following:

The plaintiff testified, that, on the night of the 10th of May, 1876, he had ten head of cattle killed and crippled. Ten died from the injuries, and one crippled did not die. It was about three miles south of New Bradford, on the south side of the track, on railroad running through Reynolds and Bradford.

L. Kellenberger testified: "I saw the plaintiff's cattle two or three miles south of Bradford, in May, 1876. They were lying on each side of the railroad, at each end of the trestle-work, from six to eight feet from the road," etc.

We can not say what New Bradford the witness had reference to, or judicially know that a point about three miles south of New Bradford was in White county. The evidence on this point was clearly insufficient. The evidence should have shown that the animals were killed in White county, as the point was jurisdictional. *The Evansville, etc., R. R. Co. v. Epperson*, 59 Ind. 438.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

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Hinshaw v. Gilpin.

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## HINSHAW v. GILPIN.

**TRESPASSING ANIMALS.—Adjoining Proprietors.—Partition Fence.—Instruction.**—In an action for damages, against an adjoining proprietor, for injury to a crop growing within the plaintiff's enclosure, by the cattle of the defendant, which had broken over a partition fence and entered upon such crop, wherein a third person had testified that he was the owner of an undivided interest in such crop, it was not error in the court, in its instructions to the jury, to refer to the ownership claimed by the witness.

**SAME.—Agreement to Maintain Partition Fence.—Evidence.—Witness.—Expert.**—It was not error in such action to instruct the jury, that, if the defendant's cattle had broken over that part of such fence which it was the plaintiff's duty to maintain, the plaintiff could not recover unless he had established "by the testimony of skilful men," that "the fence was such as good husbandmen generally keep."

From the Hamilton Circuit Court.

*D. Moss, T. J. Kane and T. P. Davis*, for appellant.

*J. W. Evans and R. R. Stephenson*, for appellee.

Howk, C. J.—This suit was commenced by the appellant, as plaintiff, against the appellee, as defendant, before a justice of the peace of Hamilton county, in a complaint of a single paragraph, wherein the appellant alleged, that, on the 8th day of September, 1876, and frequently since, the appellee suffered his cattle, to wit, four cows and one yearling bull, to unlawfully break into the appellant's cornfield, and destroy a large quantity of corn therein growing, to the appellant's damage in the sum of fifty dollars. Wherefore, etc.

The trial of the cause before the justice resulted in a judgment for the defendant, the appellee, and the plaintiff appealed therefrom to the court below.

In this latter court, the cause was tried by a jury, and a general verdict was returned for the appellee. With their general verdict, the jury also returned their special findings on particular questions of fact submitted to them; but, as there was no motion for a judgment on these special findings, we need not set them out in this opinion.

The appellant's motion for a new trial having been overruled, and his exception entered to this ruling, judgment was rendered by the court on the general verdict.

In this court, the only error assigned by the appellant is the decision of the circuit court, in overruling his motion for a new trial. In this motion, the following causes for such new trial were assigned :

1. The verdict of the jury was contrary to law ;
2. The verdict was not sustained by sufficient evidence ;
3. The verdict was contrary to the evidence ; and,
4. The court erred in giving instructions numbered respectively from 6 to 15, both inclusive, to the giving of each of which said instructions the appellant at the time excepted.

In their argument of this cause, in this court, the appellant's counsel evidently rely upon the fourth cause for a new trial, the alleged error of the court below, in its instructions to the jury, as the only ground upon which they claim a reversal of the judgment and a new trial of the action. We will briefly consider and pass upon the objections of counsel to the different instructions complained of in argument.

Counsel say : " The sixth, seventh, eight and ninth instructions are each based upon the theory that one Benjamin Smith is the owner of the corn in controversy, or at least a part of it. There is no evidence showing that said Smith had, or claimed to have, any interest in the corn in controversy, claimed to have been destroyed by appellee's cattle. The instructions should be applicable to the evidence ; and while a part of the instructions referred to may be correct, as a proposition of law, they are all erroneous when applied to the evidence." The objections of the appellant's attorneys to these instructions are not sustained by the evidence in the record. On the trial, Benjamin Smith was a witness ; and his evidence, which

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was not contradicted, showed that he was the owner of one-half of the corn in controversy. These instructions were therefore "applicable to the evidence;" and, as counsel concede them to be correct as legal propositions, they were not "erroneous, when applied to the evidence."

The appellant's attorneys complain, in argument, of the eleventh instruction, which reads as follows:

"Or, if you find from the evidence, that the fence, over which the stock of the defendant entered on the lands of the plaintiff, was a partition fence, dividing the lands of the parties to this suit, and that the stock of the defendant crossed over such fence at a place where it was the duty of the plaintiff to maintain such fence, then defendant would not be liable in this case, unless the plaintiff has shown, that the fence was such as good husbandmen generally keep, by the testimony of skilful men."

This instruction was not erroneous. On the contrary, we think it stated the law correctly, where the suit is between adjoining proprietors, as to a partition fence between their lands. Under section 15 of "An act concerning inclosures, trespassing animals, and partition fences," approved June 4th, 1852, as the section was amended by an act approved December 19th, 1865, provision was made for "a lawful partition fence," which should in all cases "be such as to enclose and restrain sheep, unless by mutual consent of the parties interested, they agree to build a fence only to restrain or enclose horses, mules or cattle." 1 R. S. 1876, p. 496. Prior to the passage of this amendatory act, the statutes of this State did not provide for nor define "a lawful partition fence." The closing sentence of said section 15, as it now reads, was all there was of said section prior to its amendment, the original section reading as follows: "Except when otherwise specially agreed, partition fences, dividing lands occupied on both sides, shall be maintained throughout the year, equally by both parties." 1 G. & H., p. 343.

As the statute stood prior to the amendatory act of 1865, "a lawful partition fence" was neither provided for nor required, as it has since been. If, in this case, it was specially agreed between the parties, as the appellant's own testimony tended to show, that he should maintain a particular portion of the partition fence, then it was his duty, under the statute, to maintain such portion of the fence; and if, as his own evidence tended to show, the appellee's cattle crossed over such fence, at a place where it was the appellant's duty to maintain it, then the appellee would not be liable for the damage done by his cattle, unless the appellant had shown, that, at the place where the cattle crossed over, there was a "lawful partition fence," such as good husbandmen generally keep, "on the testimony of skilful men." This was the purport of the eleventh instruction, and we think it stated the law.

Appellant's counsel claim that the twelfth instruction was erroneous for the same reasons, as it was "based upon much the same theory" as the eleventh instruction was. It seems clear to us, that since, by the amendatory act of December 19th, 1865, lawful partition fences are provided for and required, the provisions of section 2 of the act of June 4th, 1852, in relation to lawful fences, have become and are equally applicable to lawful partition fences. Especially is this so, where, as in this case, the parties have specially agreed that the whole, or a specific part, of a partition fence shall be maintained by one of the parties. No error was committed by the court in giving the jury the twelfth instruction.

No objection has been pointed out by the appellant's attorneys to any of the other instructions.

We think that the appellant's motion for a new trial of this cause was correctly overruled.

The judgment is affirmed, at the appellant's costs.

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Woollen v. Ulrich et al.

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## WOOLLEN v. ULRICH ET AL.

**PROMISSORY NOTE.**—*Payable in Bank.*—*Negotiability.*—The negotiability of a promissory note payable in bank is not affected by the fact, that, by its terms, it is payable in a specified time, "or before, if made out of the sale" of a chattel therein named.

**SAME.**—*Negligence.*—*Fraud.*—One who, relying upon the representations of another as to the legal character of an instrument which he is asked to sign, executes to the latter what proves to be a promissory note payable in bank, is guilty of negligence and is liable on the note to a *bona fide* endorsee thereof for value and before its maturity, though such representations were false, though he did not know he was executing a promissory note and though the consideration of the note has failed.

**SAME.**—*Notice to Endorsee.*—*Answer.*—An answer averring such facts, and also that the note had been executed for a worthless patent-right, and that the endorsee, by reason of the general bad odor of the patent-right business, was bound to take notice of the fraudulent character of the note, is insufficient.

**SAME.**—One who, supposing that he is executing a simple article of agreement, executes an instrument which may be so separated as to show him to have apparently executed a perfect promissory note payable in bank, is liable thereon to a *bona fide* endorsee thereof before maturity and for value.

From the Huntington Circuit Court.

W. H. Trammel, for appellant.

H. B. Sayler and J. B. Kenner, for appellees.

NIBLACK, J.—William W. Woollen, Jr., as the holder, sued John H. Ulrich and Daniel Ulrich as makers, and James B. Drake as endorser, of a promissory note as follows:

"\$400.00.

FEBRUARY 5th, 1872.

"Six months after date (or before if made out of the sale of J. B. Drake's Horse Hay-Fork and Hay-Carrier), we promise to pay James B. Drake or order four hundred dollars, payable at the First National Bank at Indianapolis, value received, with use, without any relief from valuation or appraisal laws. If suit shall be instituted to enforce the payment hereof, we agree to pay a reasonable attorney's fee.

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Woollen v. Ulrich *et al.*

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"Witness: D. R. PERRY. (Signed,) "JOHN H. ULRICH,  
" S. REA. DANIEL ULRICH."

Endorsed: "J. B. DRAKE."

The complaint alleged facts amounting to an averment that the plaintiff had become, in good faith, the purchaser of the note before maturity for a valuable consideration.

Drake made default.

The other defendants answered jointly, in three paragraphs.

1. Admitting the execution of the note, but alleging that its execution was procured by fraud; that two men, whose names were unknown to said defendants, came to the residence of the defendant John H. Ulrich, in Huntington county, on the 5th day of February, 1872, and represented themselves to be agents for the sale of the patent for J. B. Drake's Horse Hay-Fork and Hay-Carrier, and solicited the services of said defendants as agents in the same business for Rock Creek, Polk and Lancaster townships, in said county; that defendants agreed to take an agency for said townships upon certain terms and conditions and none other.

"Whereupon one of said agents or pretended agents, whose name is unknown to these defendants, proceeded to and did fill up in writing a printed blank which said agents or pretended agents said was a letter of agency to sell said article in said townships, according to said contract. These defendants then and there stated to said agents or pretended agents of J. B. Drake, that they did not understand such business themselves, that they agreed to take such agency on the above terms and no others, and that they would rely on said agents or pretended agents to prepare the said papers according thereto; whereupon said agents assured these defendants that said printed blank, so filled up in writing as aforesaid, was a statement of their said agreement, and none other, whereupon these



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The case of *Nebeker v. Cutsinger*, 48 Ind. 436, was in some of its features an analogous case to the one before us. In that case, after reviewing several authorities, to which we are now again referred, it was said that "We agree with the Court of Appeals of New York and the Supreme Court of Iowa, that where a man who can, without difficulty, read, executes a paper without reading it, trusting to the party to whom it is executed for a statement of its contents, or trusting to the reading of it by the latter, there being no substantial reason shown for not reading it himself, is guilty of negligence."

It may be laid down as an established rule, that, although a man may be moved by fraudulent misrepresentations to execute a negotiable note, yet, if he carelessly and negligently so execute it, and permit such note to fall into the hands of an innocent purchaser before maturity, he can not be heard to deny his liability to pay it. Having thus negligently thrown his note upon the market, as between himself and such innocent holder, he must bear the loss.

There is no escape that we can see from the conclusion, that, upon the facts stated in this first paragraph of the joint answer, the Ulrichs were guilty of great negligence in the execution of the note in controversy, and that for that reason, if for no other, such first paragraph of the answer was bad upon demurrer. *Steele v. Moore*, 54 Ind. 52.

What we have said applies with equal force to the separate answers of both the Ulrichs.

The separation of the note from the agreement, charged by Daniel Ulrich, did not necessarily invalidate the note in the hands of an innocent holder. *Cornell v. Nebeker*, *supra*.

The courts have gone to great lengths to protect the rights of the *bona fide* holder of negotiable paper, and we are not prepared to say that public policy is not best subserved by the line of judicial decisions adopted for that purpose.

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We are of the opinion, that the court erred in overruling the demurrer to the first paragraph of the joint answer of the Ulrichs, and to the separate answers of both of them, and that for these errors the judgment in their favor will have to be reversed.

The appellant has made no question upon the sufficiency of the second and third paragraphs of the joint answer of the Ulrichs, and we have consequently not considered those paragraphs.

The judgment below in favor of John H. Ulrich and Daniel Ulrich is reversed, at their costs, and the cause remanded for further proceedings not inconsistent with this opinion.

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MOSS ET AL. v. THE WITNESS PRINTING COMPANY.

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**PRACTICE.**—*Waiver of Demurrer by Answer.*—Where the defendant in an action answers prior to, and without, a decision upon a demurrer previously filed by him to the complaint, he thereby waives his demurrer.

**CONTRACT.**—*Agreement to Furnish Subscribers for Newspaper.*—*Evidence.*—*Failure of Consideration.*—In an action upon a contract wherein the defendants had agreed to furnish, within a certain period, a certain number of subscribers for a newspaper published by the plaintiff, or to pay him a certain sum of money in lieu thereof, "in consideration" that such newspaper should "be conducted in the interest, and for the advocacy, of" a certain political party, and in accordance with its platform of principles, the only evidence introduced was the written agreement and the testimony of a witness that such newspaper had been published as agreed upon, that no subscribers had been furnished within the period fixed, and that a certain part of such sum remained unpaid.

*Held*, that the evidence sustains a verdict for the plaintiff.

*Held*, also, that a failure to publish such newspaper in the interest of such party would constitute a failure of consideration, to be pleaded and proved by the defendants.

**SAME.**—*Instruction to Find for Plaintiff.*—*Interest.*—It was proper for the court to instruct the jury trying such cause to find a verdict for the plaintiff for the amount of such sum remaining unpaid, with interest thereon from the expiration of such period.

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*Moss et al. v. The Witness Printing Company.*

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From the Henry Circuit Court.

*W. R. Pierse, J. H. McConnell and J. Brown*, for appellants.

*C. L. Henry, J. H. Mellett and E. H. Bundy*, for appellee.

Howk, C. J.—This was a suit by the appellee, against the appellants, in a complaint founded upon a written contract, executed by the appellants to the appellee, of which the following is a copy :

“We, the undersigned, hereby agree with the Witness Printing Company, of Anderson, Indiana, to furnish five hundred subscribers to the newspaper, called *The Witness*, published by said company, and to pay for said subscribers one dollar and fifty cents in advance; and we further agree to furnish the full five hundred subscribers within thirty days of the date of this agreement; and, in case of failure to furnish the full number above named, we will pay the full amount of seven hundred and fifty dollars for the full number of five hundred above enumerated. It is further understood, that this agreement, on the part of the undersigned, is in consideration of said *Witness* being conducted in the interest of, and for the advocacy of, the Independent Greenback Party, in accordance with the principles of the platform of the National Independent Greenback Party. In further witness of this agreement, we hereunto subscribe our names, at Anderson, this 1st day of July, 1876.

(Signed,) “JOEL EPPERLEY, D. B. DAVIS, W. H. H. BENNEFIEL, E. C. HILLIGOSS, S. R. MOSS, M. MOSS, S. S. HARRISON, SANFORD R. MOSS.”

In its complaint, the appellee alleged that it had fully performed all the conditions of said contract to be performed by the appellee, but that the appellants had wholly failed and refused to perform their part of said contract, in this, that they had not, nor had either of them, ever furnished five hundred subscribers to said newspaper,

called The Witness, nor any part thereof, and had not paid the appellee said sum of seven hundred and fifty dollars, nor any part thereof, to the appellee's damage in the sum of seven hundred and fifty dollars. Wherefore, etc.

The appellants Samuel R. Moss, Montgomery Moss and Sanford R. Moss, jointly demurred to the appellee's complaint. Before this demurrer was decided, on the appellee's application the venue of the action was changed from the Madison Circuit Court, in which it was commenced, to the Hamilton Circuit Court. In the latter court, the record does not show that the demurrer to the complaint was decided; but the same appellants jointly answered in three paragraphs, the first being a general denial, and each of the other two setting up affirmative matters, by way of defence.

The appellee replied to the second and third paragraphs of said answer by a general denial thereof.

On the appellants' application, the venue of the action was changed from the Hamilton Circuit Court to the court below. At the April term, 1877, of the latter court, the appellee and the appellants Samuel R., Montgomery and Sanford R. Moss appeared by their counsel, and the appellants Joel Epperley, Dr. B. Davis, William H. H. Bennefiel, Edward C. Hilligoss and Stephen C. Harrison, being each three times audibly called by the sheriff of Henry county, came not, but herein made default.

The issues joined were tried by a jury, and a verdict was returned for the appellee in the sum of six hundred and ninety dollars and fifty cents.

The appellants' motion for a new trial was overruled by the court, and to this decision they excepted, and judgment was rendered against all the defendants for the amount of the verdict.

In this court all the appellants have assigned, as errors, the following decisions of the circuit court:

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1. In overruling their motion for a new trial; and,
2. In overruling their demurrer to the complaint.

The appellants Samuel R. Moss, Montgomery Moss and Sanford R. Moss separately assign the same errors.

We will consider and pass upon these alleged errors, in the inverse of the order of their assignment.

The appellants Samuel R., Montgomery and Sanford R. Moss alone demurred to the appellee's complaint; but the record fails to show, as we have seen, either that the court decided the demurrer, or that the appellants excepted to any such decision. It appears, that, without any action being had on their demurrer, the same appellants filed their answer to the complaint. In this state of the record, we must hold that these appellants, by answering the complaint before their demurrer thereto was decided, thereby waived their demurrer. *Gordon v. Culbertson*, 51 Ind. 334.

There was no demurrer to the complaint on the part of the other appellants.

The question of the sufficiency of the appellee's complaint was not properly saved in the record, and is not presented for our decision by the errors assigned by the appellants or by any of them.

The causes for a new trial assigned by the appellants, in their motion therefor, were, that the verdict of the jury was contrary to law and was not sustained by sufficient evidence, that the amount of recovery was too large, and that the court erred in its instructions to the jury.

The evidence on the trial is properly in the record.

The appellee's evidence consisted of the written agreement between the parties, sued on in this action, and already given in our statement of the complaint, and the testimony of A. A. Brown, as follows:

"I was a stockholder in the Witness Printing Company, and acting as its president at the time the contract was made. The total number of subscribers paid for, up to this time,

is in the neighborhood of sixty. Ten of them were paid for first of July, or within the thirty days. The paper is still published at this time, and has been issued every week from the time of this contract."

"This was all the evidence given in the cause," the appellants having offered none whatever.

It is earnestly insisted by the appellant's counsel, that the verdict of the jury was not sustained by sufficient evidence. The position is assumed, as we understand the argument of counsel, that, in order to entitle the appellee to a recovery in this action, its evidence must have shown that its newspaper, called "The Witness," had been conducted in the interest, and for the advocacy, of the "Independent Greenback Party," in accordance with the principles of the platform of the National Independent Greenback Party. In other words, the appellants' counsel claim, as we understand them, that what is termed in the contract its "consideration," was in fact a condition precedent to the appellants' liability to the appellee, under the terms of the agreement, and that the evidence was not sufficient to sustain the verdict, because there was no evidence introduced for the purpose of showing that "The Witness" had in fact been conducted "in the interest and for the advocacy of the Independent Greenback Party, in accordance with the principles of the platform of the National Independent Greenback Party." It seems to us, however, that, if the appellee's newspaper was not in fact conducted in the manner stipulated for in the contract, this would have been merely a failure of the consideration, partial or complete, as the facts might have been, for the contract of the appellants. Such failure of consideration, if it existed, was strictly matter of defence for the appellants, to be stated in their answer and sustained by their evidence. In neither of the paragraphs of their answer

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did the appellants, or any of them, set up a failure of consideration, partial or total, of the contract sued upon, as a defence to this action; and, as we have seen, they introduced no evidence whatever upon any point on the trial of this cause. As the appellants did not attempt, either in their pleadings or by their evidence, to show any failure of the consideration of the contract, or that the appellee had not conducted its newspaper in the manner mentioned in said contract, it was unnecessary, we think, for the appellee to show by its evidence, that there had been no failure of the consideration for the appellants' contract, or that it had in fact conducted its newspaper in the interest, and for the advocacy, of the Independent Greenback Party, in accordance with the principles of the platform of the National Independent Greenback Party.

Under the issues joined in this case we are clearly of the opinion, that the verdict of the jury was in accordance with law and sustained by sufficient evidence.

The appellants complain of the instructions of the court to the jury trying the cause. These instructions were as follows:

"1st. Under the evidence in this cause, it is your duty to return a verdict for the plaintiff.

"2d. The plaintiff is entitled to recover the sum of seven hundred and fifty dollars, less any amount paid by the defendants, or either of them, upon the contract in suit, together with six per cent. interest on the remainder, from the 1st day of August, 1876, to this date.

"3d. The form of your verdict will be: We, the jury, find for the plaintiff, and assess its damages at — dollars, filling the blank with the amount you may find to be due."

Under the evidence on the trial, it is quite clear, we think, that there was no error in these instructions, or either of them. The entire evidence is set out elsewhere

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The State, ex rel. Cory, v. Brewer et al.

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in this opinion, and it will be seen therefrom that it consisted of the written contract sued upon and the testimony of the appellee's president as to the amount that had been paid by the appellants on the contract. There was no conflicting evidence before the jury. It was the province and duty of the court to construe the written contract, and instruct the jury as to its legal effect. In the discharge of this duty, it seems to us that the court could not well have done otherwise, on the evidence, than to instruct the jury to return a verdict for the appellee. This was not usurping the province of the jury, but it was simply a discharge of duty by the court. *Hynds v. Hays*, 25 Ind. 31; *Steinmetz v. Wingate*, 42 Ind. 574; *Dodge v. Gaylord*, 53 Ind. 365.

The appellants' counsel have elaborately discussed, in their brief of this cause in this court, several questions in connection with the sufficiency of the appellee's complaint; but these questions we neither consider nor decide, because, as we have seen, the question of the sufficiency of the complaint was not properly saved in the record, and is not presented for our decision by either of the alleged errors in the appellants' assignment thereof.

We find no available error in the record of which the appellants have complained in their assignment of errors in this court.

The judgment is affirmed, at the appellants' costs.

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THE STATE, EX REL. CORY, v. BREWER ET AL.

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153 502

JUSTICE OF PEACE.—*Finding and Judgment More than Four Days After Trial.—Dismissal of Cause by Circuit Court.*—The fact that the justice's transcript, in a cause appealed from a judgment rendered by him to the circuit court, shows that his finding was made and the judgment rendered



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by him more than four days after the trial of the cause, is not ground for dismissing the cause.

SAME.—The entry of such judgment was an act *coram non judice*, but, on appeal to the circuit court, the judgment was opened and the cause there stood for trial *de novo*.

From the Henry Circuit Court.

J. Brown and J. M. Brown, for appellant.

M. E. Forkner, for appellees.

BIDDLE, J.—Complaint by the appellant against the appellees, founded on the official bond of a justice of the peace.

The suit was commenced before a justice of the peace in Randolph county.

Judgment for appellant.

The appellees appealed to the Randolph Circuit Court, from which a change of venue was taken to the Henry Circuit Court.

A bill of exceptions informs us, that "The defendants in the above entitled cause moved the court to dismiss said cause, for the reason that the transcript of the justice of the peace before whom said cause was tried showed that the justice made his finding, and rendered judgment, more than four days after the trial of said cause before him, which motion the court sustained, and dismissed said cause, to which ruling, in sustaining said motion and dismissing said cause, the relator, Isaac S. Cory, objected and excepted."

Judgment of dismissal and appeal.

This ruling is wrong. When the case was appealed from the judgment of the justice, the judgment he rendered was opened, and the case left pending as if no judgment had ever been rendered. The judgment, whether right or wrong, no longer existed. It was simply a pending suit. The case of *Burton v. McGregor*, 4 Ind. 550, cited by the appellees, does not sustain them. That case was a *scire facias* to obtain execution on a judgment, not on an

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Hudspeth *et al.* v. Herston.

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appeal from a judgment, in which the court very properly says: "The entry of judgment by the justice, at the time he did, was an act *coram non judice*;" not that the case itself was *coram non judice*. The rendition of a wrong judgment by a justice is no ground for dismissing the cause on appeal. *The Louisville, New Albany and Chicago R. W. Co. v. Breckenridge*, ante, p. 113.

We do not decide that the appeal might not have been dismissed, but are clearly of the opinion that it was erroneous to dismiss the action.

The judgment is reversed, at the costs of the appellees; cause remanded, with instructions to overrule the motion to dismiss the cause, and to reinstate the same for further proceedings.

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HUDSPETH ET AL. v. HERSTON.

**JURY.—Relationship to Party.—Second Cousin.—Rules of Civil Law.—Relationship**, either by consanguinity or affinity, within the sixth degree inclusive, by the rules of the civil law, existing between a juror and a party to an action, disqualifies such juror to sit as such upon the trial of that action, even though such relationship be unknown to both the juror and the party until after the trial.

**SAME.—Examination of Jury by Court.—Knowledge of Relationship.—New Trial.—Waiver.**—A jury, upon being duly sworn, answered in the negative a question put to them by the court as to whether any of them were "related, by blood or marriage, to either party to the suit," whereupon they were sworn and tried the cause. A motion was made by the losing party, for a new trial, upon the ground that he had, since the trial, discovered that one of the jurors was a second cousin of the opposite party. **Held**, that, though neither the juror nor the successful party knew of such relationship until after the trial, and though the losing party had not questioned the jury concerning the matter of relationship, he had not waived his right, but was entitled, to a new trial.

From the Warrick Circuit Court.

*I. S. Moore, J. C. Denny and C. S. Denny*, for appellants.

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*Hudspeth et al. v. Herston.*

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Howk, C. J.—This was a suit by the appellee, against the appellants, on certain notes executed by the latter to the former, and alleged to be due and unpaid.

Answers and replies were filed, putting the cause at issue.

We need not notice these pleadings further, as no question concerning them is presented for our decision.

The issues joined were tried by a jury, and a verdict was returned for the appellee, and judgment was rendered thereon. Thereupon the appellants moved the court to set aside the verdict and grant them a new trial, which motion was overruled, and to this ruling they excepted, and appealed to this court.

The appellants have here assigned as error the decision of the circuit court, in overruling their motion for a new trial. The causes assigned for such new trial, and the affidavits filed in support of and against the motion, fairly present the grounds upon which the appellants ask for a reversal of the judgment.

It appears from the record, that, when this cause was called for trial in the court below, a trial by jury was demanded, and the sheriff then called the regular panel to try the case, among whom was Lewis A. Baker, who subsequently became the foreman of said jury; that, before the jury were sworn to try the case, they were first sworn to answer such questions touching their qualifications as jurors as might be propounded to them, under the direction of the court; that the court then, in a loud, plain and distinct voice, read the names of the parties to this suit, plaintiff and defendants, and in a like loud, plain and distinct voice, asked said jury the following question: "Are either of you related, by blood or marriage, to either of the parties to this suit?" That said Lewis A. Baker, being then in the jury box, and clearly understanding said question, answered the same in the negative; and that the

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said Baker was thereupon accepted as a juror, and was afterward empanelled and sworn with the jury and tried this cause. It further appeared that said Baker was in fact related by blood to the appellee, within the prohibited degrees, in this, that the appellee's grandmother and the grandfather of said Baker were brother and sister, and that this relationship was not known to either the appellants or their counsel until after the jury had returned their verdict. In an affidavit made by the appellee, he admitted the relationship as stated between himself and the juror Baker, but did not know at the time of the trial that "he was as nearly related to the juror, as in fact he was." The juror, Baker said in his affidavit, that, when he was examined touching his qualifications as a juror in this case, he did not know he was any relation of the appellee, and when he answered the question propounded by the court in the negative, he did so in utter ignorance of the relationship between him and the appellee, which had since come to his knowledge.

Upon the facts shown by the affidavits filed with the appellants' motion for a new trial, it is very clear that Lewis A. Baker was not a competent juror on the trial of this cause. In the eleventh clause of the 1st section of "An act in relation to the construction of statutes, and the definition of terms," approved June 18th, 1852, it is provided, that, "When a person is required to be disinterested or indifferent in acting on any question, or matter affecting other parties, consanguinity or affinity within the sixth degree, inclusive, by the civil law rules, or within the degree of second cousin inclusive shall be deemed to disqualify such person from acting except by consent of parties." 2 R. S. 1876, p. 316. *Trullinger v. Webb*, 3 Ind. 198; *Dearmond v. Dearmond*, 10 Ind. 191; and *High v. The Big Creek Draining Association*, 44 Ind. 356.

It can not be said, we think, under the facts shown by

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the affidavits in this case, that the appellants consented to the trial of this action by a cousin of the appellee, when they did not know of such relationship until after the trial. Nor can it be correctly said, that the appellants have waived the objection to the juror, on account of his relationship to the appellee, because they did not, personally or by their counsel, examine the juror on his oath as to his relationship to the appellee. We are clearly of the opinion, that, as to this matter, the appellants had the right to rely implicitly, without any further examination, upon the answer of the juror to the question propounded to him by the court.

It seems to us, also, that the fact alleged by the juror in his affidavit, that, at the time of the trial, he was wholly ignorant of any relationship between him and the appellee, can have no possible bearing on the correct decision of the question now under consideration. The appellants had a clear legal right to have their case tried by a disinterested jury. Under the law, the juror, Baker, was not a competent juror; but, without fault or negligence on the part of the appellants, and in ignorance of his incompetency, they accepted him as a juror. As soon as they were informed of the juror's incompetency, the appellants moved the court, on that ground, for a new trial of this cause, but the motion was overruled.

We think, that, under the facts of this case, as shown by the affidavits and counter affidavits, the appellants were lawfully entitled to a new trial of this action, and that the court below erred in overruling their motion therefor.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings.

## Hadley v. Prather.

## HADLEY v. PRATHER.

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164	664

**PLEADING.—Counter-Claim.—Answer.**—No single pleading can perform the double office of answer and counter-claim.

**CONTRACT.—Breach of Parol Contract.—Acceptance.—Pleading.—Fraud.**—In a complaint upon a parol contract for the manufacture of a certain quantity of brick, at a certain price, and for laying them in a wall, at a certain additional price, the plaintiff alleged the manufacture of the brick, and the refusal of the defendant either to pay for the same or to permit the plaintiff to lay them in such wall. The defendant filed a counter-claim, admitting the contract for manufacturing and averring that he had paid for the same in full, but alleging, that, though the plaintiff had contracted to manufacture a first-class article, he had in fact manufactured an inferior and useless article.

**Held**, on demurrer, that the counter-claim is insufficient.

**Held**, also, no fraud being alleged, that the defendant, by accepting the article, became bound for its reasonable value.

**SAME.—Evidence.—Damages.**—Evidence showing the damages suffered by the plaintiff by reason of the alleged breach of contract is admissible under a general allegation in his complaint of damages.

**PLEADING.—Practice.—Harmless Error.**—Error in sustaining a demurrer to a paragraph of a pleading is harmless, if the facts therein alleged are admissible in evidence under a remaining paragraph.

**INSTRUCTION.—Harmless Refusal.**—Where the substance of an instruction refused is embraced in one given, the refusal is harmless.

From the Hendricks Circuit Court.

*E. G. Hogate* and *R. B. Blake*, for appellant.

*C. C. Nave* and *C. A. Nave*, for appellee.

**NIBLACK, J.**—This was a suit by Thomas L. Prather, against John Hadley, for the breach of an alleged parol contract.

The complaint was in two paragraphs.

The first paragraph was upon a contract for making and burning one hundred and fifty-eight thousand and eight hundred brick, on the land of Hadley, at the agreed price of three dollars and twenty-five cents per thousand, and for putting and laying said brick into a new brick house for said Hadley, on his farm, for the additional sum of three dollars and twenty-five cents per thousand.

The breach complained of was the failure to pay a bal-

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Hadley v. Prather.

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ance due of eight dollars for making and burning the brick, and the refusal to allow Prather to lay the brick in the walls of the said new house, to be erected by Hadley on his said farm.

The second paragraph was upon a contract to make and burn a similar quantity of brick on the land of Hadley, at the price of three dollars and twenty-five cents per thousand, and for putting the said brick into a house for Hadley, on his farm, at the further sum of three dollars and twenty-five cents per thousand, to be measured in the wall.

The breach complained of was, also, a failure to pay for making and burning said brick, and a refusal to allow the said Prather to lay such brick into the walls of said house.

The defendant answered in four paragraphs :

1. The general denial.

2. Admitting the contract for making and burning the brick, but alleging that he had paid the plaintiff in full for the same; also alleging that the plaintiff was to make a first-class article of brick, when, in fact, the brick made were defective and of an inferior class, for the reasons that the clay out of which they were made was of a poor quality, that the brick were so set in the kiln that the benches gave way and the kiln burst, causing a great loss of brick, that the plaintiff failed to sufficiently cover the kiln, and the rain beat in upon said kiln while on fire, thus injuring the brick, and that the plaintiff failed to burn the brick long enough, so that they were soft and useless.

3. Admitting, also, the contract to have the brick made and burned, as charged in the complaint, and alleging payment for the same, but denying that there was any contract with the plaintiff for putting and laying said brick into the defendant's house, as the plaintiff alleged.

4. Again admitting the contract to make and burn the brick as charged, and alleging full payment in discharge

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Hadley v. Prather.

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of such contract, but denying any contract with the plaintiff for laying said brick in the defendant's house.

The second paragraph, though nominally a part of the answer, was pleaded and intended as a counter-claim, and concluded with a prayer for affirmative relief.

A reply was filed in general denial of the fourth paragraph of the answer, and demurrers were sustained to the second and third paragraphs.

The jury trying the cause returned a verdict assessing the plaintiff's damages at one hundred and thirty-four dollars and fifty cents, and, disregarding a motion for a new trial, a judgment was rendered in accordance with the verdict, against the defendant.

Errors are assigned upon the sustaining of the demurrers to the second and third paragraphs of the answer respectively, and upon the overruling of the motion for a new trial.

It has been several times decided by this court, and ought by this time to be regarded as a well settled legal proposition, that a single pleading can not be made to perform the double office of an answer and a counter-claim. *Campbell v. Routt*, 42 Ind. 410; *Wilson v. Carpenter*, 62 Ind. 495.

The second paragraph, so-called, of the answer in this case is discussed in the argument here as a counter-claim, and as such we have considered it.

It is not averred in this counter-claim, that the alleged inferiority of the brick was not known to the defendant when he accepted and paid for them, nor that any fraud was practised upon him to induce him to accept and pay for them. Although he may have contracted for first-class brick, yet, if he voluntarily accepted an inferior article, he became bound to pay what the brick he accepted were reasonably worth, and, in the absence of any averment to the contrary, it can not be inferred that he did pay for them more than their fair value. There was no



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Hadley v. Prather.

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error therefore in sustaining the demurrer to this second paragraph as a counter-claim. •

The third and fourth paragraphs of the answer were substantially the same in their averments, and as all the evidence which might have been given under the third paragraph could have been, and probably was, given under the fourth, the defendant was not, at all events, injured by the decision of the court sustaining the demurrer to the third paragraph. Buskirk Practice, 284; *Strough v. Gear*, 48 Ind. 100.

Upon the trial, evidence was admitted, over the objection of the defendant, tending to show what the value of the alleged contract for putting the brick into the defendant's house would have been to the plaintiff, if he had been permitted to do the work contemplated by such contract. It is insisted, that this evidence was inadmissible, in the absence of an allegation of special damages in the complaint.

It is the rule, that, in cases of executory contracts, like the one under discussion, such damages as naturally result from the breach of the contract are presumed to have accrued to the injured party, and may be recovered under a general allegation of damages in the complaint, and that the measure of damages in such cases should be the difference between the contract price of the work to be done and the reasonable cost of the work at the usual and ordinary prices. *Lindley v. Dempsey*, 45 Ind. 246; *Dunn v. Johnson*, 33 Ind. 54.

We think the evidence objected to was properly admitted.

It is also insisted, that certain instructions given by the court to the jury, on its own motion, were erroneously given, but, as these instructions were in substantial accordance with the rules above laid down for the recovery and measure of damages, we are of the opinion that they gave the law correctly to the jury, as to all the matters to which they related.

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The State, *ex rel.* HENCH, *v.* MORRISON.

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Taking the instructions given to the jury altogether, we are of the opinion, that they were as favorable to the defendant as he had any just reason to expect.

It is further insisted, that the court erred on the trial in refusing to give two instructions prayed for by the defendant.

Waiving any discussion as to the correctness of the instructions prayed, as applicable to the case at bar, we are further of the opinion, that the questions of law raised by them were better and more fully presented by the instructions given by the court upon its own motion.

Under such circumstances, the court did not err in refusing to give the instructions thus prayed for by the defendant.

We are unable to see any reason why a new trial should have been granted.

The judgment is affirmed, at the costs of the appellant.

Petition for a rehearing overruled.

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THE STATE, EX REL. HENCH, *v.* MORRISON.

**PROSECUTING ATTORNEYS OF CIRCUIT COURTS.—Duties of are Statutory.—**

*Constitutional Law.*—The duties of the prosecuting attorneys of the circuit courts of this State are prescribed by statute, and not by the constitution.

**SAME.—Power of Legislature.**—The Legislature has the right to increase or diminish the duties of such prosecuting attorneys, or to divide them with the prosecuting attorneys of other courts.

**SAME.—Act Abolishing Common Pleas Courts.**—By the act abolishing common pleas courts, the duty of the prosecuting attorneys of those courts to prosecute criminal cases before justices of the peace was transferred to and imposed upon the prosecuting attorneys of the circuit courts.

**SAME.—Criminal Circuit Prosecuting Attorney.—Prosecution of Criminal Cases before Justices.—Fees and Salaries.**—In all counties where criminal circuit courts have been established, the prosecuting attorneys of those courts have the exclusive right to prosecute criminal cases before justices of the peace, and to collect the docket fees assessed in such cases. But, where there is no criminal circuit court, such right belongs to the prosecuting attorneys of the proper circuit courts.

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The State, *ex rel.* Hench, v. Morrison.

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From the Allen Superior Court.

*J. M. Coombs, J. Morris, R. C. Bell and S. M. Hench*, for appellant.

*A. Zollars, F. T. Zollars and J. F. Morrison*, for appellee.

PERKINS, J.—Samuel M. Hench is the prosecuting attorney of the Twentieth Judicial Circuit of the State of Indiana, which is constituted of the Criminal Circuit Court of the county of Allen, in said State. James F. Morrison is the prosecuting attorney of the Thirty-Eighth Judicial Circuit in said State, which consists of the county of Allen. And the question presented for decision, in this case, is, which of said prosecuting attorneys has the right to prosecute criminal causes before justices of the peace in the said county of Allen?

The constitution of the State contains this section :

“There shall be elected, in each judicial circuit, by the voters thereof, a prosecuting attorney, who shall hold his office for two years.” Art. 7, sec. 11.

The constitution, then, while it creates the office of prosecuting attorney, and fixes the length of its term, assigns to it no duties. For these it is entirely dependent upon legislative action. This may be noticed as a starting-point.

Formerly, the duties imposed upon circuit prosecutors were the prosecution of felonies in the circuit courts and the prosecution or defence of divers civil cases of a public character, such as defending divorce suits, prosecuting bastardy cases, recovery of escheats, informations in the nature of *quo warranto*, suits on behalf of counties and in relation to trust funds, in reference to insurance companies, and in relation to other matters that might be mentioned. 1 R. S. 1876, p. 589, sec. 28 ; 2 R. S. 1876, p. 416, sec. 4 ; 2 R. S. 1876, p. 299, sec. 750 ; 2 R. S. 1876, p. 301, sec. 761 ; 2 R. S. 1876, p. 332, sec. 26 ; 2 R. S. 1876, p. 661, sec. 21.

They are still charged with those duties, or at least many of them.

When the statute creating the common pleas courts was enacted, the duty of prosecuting criminal causes in those courts, and in justices' courts, was imposed upon district prosecuting attorneys. Those duties were taken from the constitutional prosecuting attorneys. Bicknell Criminal Practice, 74.

Subsequently a court, inferior to the constitutional circuit courts, was created in certain counties, severally, in the State, called a criminal circuit court of such county. Those courts were created by constitutional laws. *Clem v. The State*, 33 Ind. 418, and cases cited.

In *Cropsey v. Henderson*, 63 Ind. 268, it is said: "That the law creating the court" (the criminal court of Marion county) "is valid, as establishing a court inferior to the constitutional circuit court, was established in the case of *Clem v. The State*, 33 Ind. 418.

"That case has been since followed. It seems to us to follow, that the prosecuting attorney of that court is the prosecuting attorney of an inferior court, and not the prosecuting attorney provided for by the constitution."

It thus appears, that prosecuting attorneys, in this State, have only such duties to perform as are imposed upon them by statute, and that it has been the legislative practice to increase and diminish those duties at will. It is plain that the Legislature had the constitutional right to divide the duties relative to the prosecution of crimes between these prosecuting attorneys, as it deemed expedient. We look, then, to the statute to ascertain on which officer they are imposed in the different courts.

The act creating the Allen Criminal Circuit Court provides, that the judge and prosecuting attorney, clerk and sheriff shall receive the same salary and fees allowed by law to the judge, prosecuting attorney, clerk and sheriff of the

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*The State, ex rel. Hench, v. Morrison.*

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circuit court; that is, the constitutional circuit court. 1 R. S. 1876, p. 393, sec. 1.

In the fee and salary act, in the same volume, on page 475, sec. 23½, it is enacted, that:

"The circuit and criminal circuit prosecuting attorney's fees shall be as follows, to wit:

"For docket fee on plea of guilty in felony,..... \$7.00

"Docket fee on plea of misdemeanor,..... 5.00

"Docket fee before a justice of the peace, on a plea of guilty, or on conviction,..... 5.00 "

By these statutory provisions, the criminal court prosecutor is to receive the same fees, in cases before justices of the peace, as the constitutional circuit court prosecutor. Both can not receive them in the same case. The only reasonable construction, therefore, as it seems to us, that can be put upon these statutory provisions, is, that each prosecutor receives them in the cases in which he is the legal prosecutor. This leads, necessarily, to the inquiry: In which courts is each the legal prosecutor? Let us look, for a moment, at the real state of the case:

The State was divided into judicial circuits, each composed of several counties, in which there was a constitutional prosecuting attorney. In each of several of these counties there was created a criminal court, inferior to the constitutional circuit court, in which jurisdiction to punish all crimes then punishable in constitutional circuit courts was expressly vested, and having a prosecuting attorney, separate from the constitutional prosecuting attorney, to prosecute for crimes within the jurisdiction of such inferior criminal courts. 1 R. S. 1876, p. 391, *et seq.* But the constitutional prosecuting attorney after the abolition of the office of district attorney with the abolition of the court of common pleas, had the right to prosecute criminal cases before justices of the peace, and receive a docket fee in cases of convictions. 2 R. S. 1876, p. 415.

The acts creating the criminal circuit courts, as we have

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The State, *ex rel.* Hench, *v.* Morrison.

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said, expressly transferred to those courts jurisdiction of all criminal cases theretofore punishable in the constitutional circuit courts and the courts of common pleas, and the right to prosecute those cases to the prosecuting attorneys of those courts, but did not expressly give the prosecutors of those courts the right to prosecute cases before justices of the peace. But it was decided in *Wachstetter v. The State*, 42 Ind. 166, that the criminal circuit courts had jurisdiction, on appeal, of criminal cases prosecuted before justices.

A statute of December 20th, 1865, provided, that, "in case there be a criminal circuit court in such county, the appeal shall be taken to it within thirty days on entering into a recognizance," etc., 2 R. S. 1876, p. 670, sec. 10; and, as we have seen above, the fee and salary bill provides that the prosecutor of the criminal circuit court is entitled to the docket fees in cases prosecuted before justices, which, by implication, authorizes him to prosecute such cases.

It is in accordance with the fitness of things, and clearly with the intention of the Legislature, that the criminal prosecuting attorneys, severally, shall have the exclusive right to prosecute the criminal cases in all the courts in his county having jurisdiction thereof; and we hold that he has.

We construe the provisions of the fee and salary statute as enacting that, in counties where there is a criminal court and prosecuting attorney, such prosecuting attorney is entitled to prosecute before justices of the peace, and receive the incidental docket fee; and, in counties where there is no criminal court and prosecuting attorney, the constitutional prosecuting attorney of the constitutional circuit court may thus prosecute and receive the fees. This makes the criminal system, for the administration of the criminal law, the more symmetrical.

Judgment reversed, with costs, and cause remanded; right to be given to relator.

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Wray, Administrator, v. Chandler, Guardian, et al.

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**WRAY, ADMINISTRATOR, v. CHANDLER, GUARDIAN, ET. AL.**

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127	444
64	146
135	593
135	689
64	146
139	74
64	146
164	372
164	408

**JUDGMENT.**—*Release of, on Abandonment of Appeal from.*—*Injunction.*—The abandonment, by a judgment defendant, of his right to appeal from a judgment to the Supreme Court, is a valid consideration for the execution, by the judgment plaintiff, of a release of such judgment. And, upon obtaining such release, he may maintain an action to enjoin the collection of an execution subsequently issued upon such judgment, and to have the judgment satisfied.

**SAME.**—*Fraud.*—*Insane Person.*—*Plea of Fraud, by Guardian or Committee.*—Fraud in procuring such release, practised by the judgment plaintiff, upon the judgment defendant, is a good defence to such action; and where the former, since the execution of such release, has been duly declared of unsound mind, the fraud may be pleaded on his behalf by his guardian or committee.

**SAME.**—*Contract.*—The contract of an insane person not under guardianship is voidable merely.

From the Johnson Circuit Court.

*K. M. Hord, A. Blair and C. A. Sprague, for appellant.*  
*B. F. Love, B. F. Davis and W. Z. Conner, for appellees.*

Howk, C. J.—On the 22d day of May, 1869, this action was commenced by Thomas Wray, as plaintiff, against Whitfield Chandler, an insane person, and William A. Moore, then his guardian, and John Hoop, then the sheriff of Shelby county, Indiana, as defendants, in the Shelby Circuit Court.

In his complaint the plaintiff alleged, in substance, that, on the 23d day of January, 1868, by the consideration of the said Shelby Circuit Court, the said Whitfield Chandler recovered a judgment against said plaintiff and one Eldridge G. Mayhew, for the sum of one thousand four hundred and eighty dollars and twenty-three cents; that, at the March term, 1869, of the court of common pleas of said Shelby county, the said Whitfield Chandler, on an inquest being had, was placed under guardianship, and the said William A. Moore was by said court appointed and qualified as such guardian; that said judgment was obtained against said plaintiff wrongfully, and through and by the wrongful and

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Wray, Administrator, v. Chandler, Guardian, *et al.*

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fraudulent acts of his codefendant, and against the express protestations of the said Whitfield Chandler that the plaintiff was not indebted to him in any sum of money whatever, which statement of the said Chandler the plaintiff averred was true; that, on the 1st day of March, 1868, and before the finding that said Chandler was of unsound mind, and unable, from want of mental capacity, to take care of and manage his estate, and while he was yet of sound mind and capable of managing his own estate, the plaintiff, feeling himself aggrieved by said judgment, was preparing to seek redress by an appeal to a higher court; that said Whitfield Chandler, then being of sound mind and capable of managing his own estate, and well knowing that said judgment was obtained against the plaintiff, jointly with his codefendant, Mayhew, by the wrongful and fraudulent acts of said Mayhew, and to prevent further litigation, expense and trouble over the matter, it was agreed between the plaintiff and said Chandler, on the 7th day of March, 1868, that the plaintiff should pay him, said Chandler, the sum of seven hundred and forty dollars, and he, said Chandler, would receive the same in full satisfaction and discharge of the plaintiff from liability on said judgment; that, in discharge of his said agreement, the plaintiff afterward, on said 7th day of March, 1868, paid said Whitfield Chandler the said sum of seven hundred and forty dollars, in full satisfaction and discharge of his liability on said judgment, and that said Chandler so received and accepted the same, and executed and delivered to the plaintiff a release in writing from all liability on said judgment, a copy of which release was filed with and made part of said complaint; that, since the payment of said sum of seven hundred and forty dollars, and the making release, to wit, on the 1st day of January, 1869, some person, on behalf of said Whitfield Chandler, caused an execution to be issued on said judgment, and placed in the hands of the defendant Hoop, to be levied; that, since the



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appointment of the defendant Moore as such guardian, he, the said Moore, having full notice and knowledge of all the above facts, and that said Chandler was still insisting that the plaintiff was not indebted to him in any amount, and intending wrongfully, wantonly and without any reasonable pretence, to injure the plaintiff, caused said execution, in the hands of said sheriff, to be levied upon the plaintiff's real estate, particularly described, in the city of Shelbyville, in said county, and to be advertised for sale on the 22d day of May, 1869, and would sell the same if not restrained by the court. Wherefore the plaintiff prayed for a perpetual injunction against the defendants, and that the said judgment, as to the plaintiff, might be declared satisfied, and for other proper relief.

The complaint was duly verified by the plaintiff, and, a proper undertaking having been executed and filed, a temporary restraining order was granted by the court, in accordance with the prayer of the complaint.

The defendant William A. Moore, as guardian, answered in two paragraphs, in substance, as follows:

1. A general denial; and,
2. The said Moore admitted that the defendant Whitfield Chandler, at the March term, 1869, of the Shelby Common Pleas, was declared to be a person of unsound mind and incompetent to manage his own estate, and that he, said Moore, was then duly appointed, and had ever since been and still was, his guardian; that the said Chandler, on the 23d day of January, 1868, in the Shelby Circuit Court, obtained a judgment against the plaintiff and one E. G. Mayhew, in the sum of one thousand four hundred and eighty-three dollars and twenty-five cents; that said judgment was obtained upon notes executed by the plaintiff and said Mayhew, as partners, to the said Chandler, for money loaned by him to them; that, at the time of the trial upon which said judgment was rendered, the

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said Chandler was quite aged, feeble in body and mind, and easily controlled by the plaintiff, who then and there had his confidence; that the said Mayhew was then and there insolvent, and had so remained ever since; that, for the fraudulent purpose of avoiding the payment to said Chandler of his said debt, at the time of the pendency of said action, in said circuit court, the plaintiff caused said Chandler to be brought to his house, a distance of ten miles, the said Chandler being then and there physically unable to leave his house, and wholly incompetent, by reason of mental imbecility, to manage his own affairs or to understand the nature of his said action and the facts of the same, and, being in such condition of body and mind, the plaintiff, for the purpose aforesaid, induced the said Chandler to state, upon the witness stand, when called by the plaintiff as a witness, that said money was loaned to said Mayhew, and not to him and the plaintiff; that the truth was, that said money was loaned to said plaintiff and Mayhew, and was by them used and employed in their partnership business; that, ever since said judgment was obtained, the said Chandler had remained and still was in such condition of body and mind; and that, while in such condition of body and mind, and while the plaintiff had the confidence of said Chandler and controlled his judgment, the plaintiff obtained the release set up in his complaint, without paying to said Chandler any part of said judgment whatever, and that said judgment remained wholly unpaid. Wherefore, etc.

Afterward, at the April term, 1870, of the Shelby Circuit Court, the said William A. Moore was appointed a committee for Whitfield Chandler, to answer for him; and thereupon the said Moore, as such committee, answered in two paragraphs, in substance, as follows:

1. A general denial; and,
2. That heretofore, on the —— day of ——, 186—, and at the time of the pretended execution of the written release

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declared on and set forth in the plaintiff's complaint, as an exhibit thereto, the plaintiff called upon the said Chandler, who was then and there aged, feeble in body and mind, and under the influence and control of the plaintiff; that the plaintiff, then and there well knowing the condition of said Chandler, and having then and there such control over him, then and there presented to him, said Chandler, the certain instrument of writing referred to in this answer, and being the foundation of the plaintiff's complaint to procure the entry of satisfaction of the judgment therein named, and then and there read or pretended to read the same to said Chandler as and for the said Chandler's consent that the plaintiff might and should mortgage his real estate to the sinking-fund, for the purpose of procuring a loan from said fund, and for no other purpose whatever; and that the plaintiff then and there promised said Chandler, that, if he would execute said instrument, he would, upon demand, pay to said Chandler the judgment mentioned in plaintiff's complaint; and that, upon such reading of said instrument and the plaintiff's said promise, the said Chandler then and there executed said instrument without knowing the contents thereof, and not having sufficient mind and memory to know or understand the same. Wherefore, etc.

The plaintiff demurred to the second paragraph of each of said answers, upon the ground that it did not state facts sufficient to constitute a defence to his action, which demurrers were overruled by the court, and to these decisions he excepted.

The plaintiff then replied, by a general denial, to each second paragraph of said answers.

Afterward, at the April term, 1872, of the said Shelby Circuit Court, on the plaintiff's application, the venue of the action was changed therefrom to the court below.

Afterward, at the April term, 1873, of the latter court,

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the death of the plaintiff having been suggested, the appellant, Isom Wray, as the administrator of said decedent, was substituted as plaintiff; and said William A. Moore, having resigned his said guardianship, the appellee Jesse Chandler, as the successor of said Moore in said trust, was substituted as a defendant in this action.

The cause was then tried by a jury, and a verdict was returned for the defendants, the appellees.

The appellant's motion for a new trial was overruled, and to this ruling he excepted, and judgment was rendered on the verdict.

In this court, the following decisions of the court below have been assigned by the appellant, as alleged errors :

1. In overruling the plaintiff's demurrer to the second paragraph of the answer of the defendant William A. Moore, as guardian;

2. In overruling the plaintiff's demurrer to the second paragraph of the answer of the defendant Moore, as committee; and,

3. In overruling the appellant's motion for a new trial.

1. It is insisted by the appellant's counsel, that the matters alleged in the second paragraph of the answer of Moore, as guardian, were not sufficient, on the demurrer thereto, to constitute a defence to this action. It is very true, we think, as claimed by counsel, that the allegations of this paragraph do not show that the release executed by said Whitfield Chandler, and counted upon in the appellant's complaint, was absolutely void by reason of the insanity of said Chandler; for it was not shown in said paragraph, that the said Chandler, at the time of his execution of said release, had been found to be a person of unsound mind, in the mode prescribed by the statute, and placed under guardianship as an insane person. 2 R. S. 1876, p. 598.

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It is the settled law of this State, that the contract of a person of unsound mind, who is not under guardianship as an insane person, is not absolutely void, but is merely voidable. *Crouse v. Holman*, 19 Ind. 30; *Musselman v. Cravens*, 47 Ind. 1; and *Freed v. Brown*, 55 Ind. 310.

But, although the averments of the paragraph do not show that the release in question was absolutely void, yet it seems to us that they do show, with sufficient clearness and certainty, that the release was obtained by and through the alleged fraud of Thomas Wray, and without any consideration whatever therefor.

In our view of this paragraph it stated a good defence to the appellant's action, and the demurrer to it was properly overruled.

2. What we have said in reference to the second paragraph of the answer of Moore, as guardian, is equally applicable, we think, to the second paragraph of the answer of Moore, as committee.

This latter paragraph failed to show, that the release described in the complaint was absolutely void; but it showed, with even more clearness and certainty than the former paragraph, that the release in question was obtained by the fraudulent practices, as alleged, of the appellant's decedent, and without any sufficient consideration therefor.

It is very clear, we think, that this second paragraph of the committee's answer stated a good defence to the action of the appellant's decedent, and that no error was committed by the circuit court in overruling the demurrer to said paragraph.

3. In his motion for a new trial the appellant assigned the following causes therefor:

1. The verdict of the jury was not sustained by sufficient evidence;
2. The verdict of the jury was contrary to law;

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3. The court erred in refusing to give the instructions numbered 1, 2, 3, 4 and 5 respectively, asked for by the appellant ;

4. The court erred in giving, of its own motion, instructions numbered 5, 6, 7, 8, 9, 10, 11 and 12 respectively.

The evidence on the trial of this cause is properly in the record ; but we do not think it necessary that we should cumber this opinion with this evidence. It has been carefully examined, weighed and considered, and we can not avoid the conclusion, if we would, that it utterly fails to sustain the verdict of the jury. The complaint in this case stated a good and sufficient cause of action. This was so manifest that it was not thought necessary or advisable, apparently, to test its sufficiency by a demurrer thereto. The allegations of the complaint were sustained by an abundance of uncontradicted evidence. But it seems to us, that there was an entire failure of any sufficient evidence to sustain the material averments of the affirmative paragraphs of the appellees' answers. The gist of the defence, as we have seen, was the alleged fraudulent conduct and evil practices of the appellant's decedent, whereby he obtained from Whitfield Chandler the written release described in the complaint, without any sufficient consideration. There is no evidence in the record of any fraudulent conduct or evil practice, on the part of the decedent, towards Whitfield Chandler. It would seem, indeed, from the evidence, that there was no necessity for the decedent to have recourse to fraud or undue influence to obtain the written release, for Chandler himself declared at all times that he had no just or valid demand against the decedent. The proof tended to show that, at the time the release was executed, Chandler's sight was dimmed and his memory impaired by old age, but it failed to show that he was then a person of unsound mind. Nor, in our opinion, is there any evidence in the record which tends to show that the

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release in question was executed without a sufficient consideration. The prevention of litigation has always been regarded as a valid and sufficient consideration, and so also the compromise or the giving up of a suit, or the abandonment of a right of appeal in a litigated case, is a valid and sufficient consideration, for any contract or agreement founded thereon or connected therewith. This doctrine is so well recognized and approved, in legal textbooks and the reports of adjudicated cases, that it needs no citation of authorities to support it.

The conclusion we have reached, in regard to the utter insufficiency of the evidence to sustain either the appellees' defence or the verdict of the jury in this case, renders it wholly unnecessary for us to examine and consider now the questions presented by counsel, in relation to the alleged errors of the court, in refusing to give the jury certain instructions asked for by the appellant, or in giving of its own motion certain other instructions, excepted to and complained of by the appellant as erroneous. On another trial of this cause, other and perhaps very different instructions may be given on other and it may be different evidence, and therefore we do not deem it necessary for us to pass upon the instructions now in the record. This is not a case of conflicting evidence, but, as we regard it, it is a case where there is an entire want of any sufficient evidence to support and sustain the material allegations of the affirmative paragraphs of the appellees' answers.

In our opinion therefore, the court below erred in overruling the appellant's motion for a new trial of this action.

The judgment is reversed, at the appellees' costs, and the cause is remanded with instructions to sustain the appellant's motion for a new trial, and for further proceedings.

Petition for a rehearing overruled.

FLORA v. SACHS.

**HABEAS CORPUS.**—*Petition for.*—*Imprisonment for Violating City Ordinance.*

—*Escape and Recapture.*—*Answer.*—In a proceeding for a writ of *habeas corpus*, against a city marshal, the petition alleged, "that the pretended cause for" the imprisonment of the petitioner by the defendant was, that, on a certain day, the city had "recovered a judgment against the" petitioner for a certain sum and costs, "for and on account of a violation of an ordinance of said city by" the petitioner; that, on said day, the petitioner "was committed to the city prison of said city for failing to pay or replevy said judgment and costs;" that the petitioner had been placed at labor upon the streets of said city, by the defendant, under the care of the street commissioner, and while so laboring he had escaped; and that, more than thirty days after the rendition of said judgment, he had openly returned to said city, whereupon the defendant, without warrant or other authority, had arrested and imprisoned him, and restrains him of his liberty.

*Held*, on motion to quash the writ, that the petition is sufficient.

*Held*, also, that the re-arrest and commitment of the petitioner, after the expiration of the thirty days, were unlawful.

*Held*, also, that the defendant, by answer, may show that such judgment provided for the imprisonment of the defendant until he had compensated the same by labor.

**SAME.**—*Judgment of Imprisonment.*—*Imprisonment at Hard Labor.*—*Payment.*—*Female.*—Section 20 of the act for the incorporation of cities, 1 R. S. 1876, p. 267, contemplates two different modes of enforcing the payment of a judgment for a violation of a city ordinance, viz.:

*First.* By imprisonment of the defendant, whether a male or female, in the workhouse or city prison, for a period not exceeding thirty days, where the judgment remains unpaid or unreplevied; and,

*Second.* By adjudging that the defendant, if a male, shall be required to pay the judgment and costs by manual labor, he remaining in custody until the judgment has been paid or replevied.

**SAME.**—*Effect of Simple Imprisonment.*—*Termination of.*—The thirty days' imprisonment is inflicted to enforce payment or replevy of the judgment, but does not operate as a payment of the judgment, and must be computed continuously from the date of the judgment.

From the Knox Circuit Court.

*J. S. Pritchett* and *H. Burns*, for appellant.

*H. S. Cauthorn* and *J. M. Boyle*, for appellee.

**WORDEN, J.**—The appellant, Flora, on the 8th of March,



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1879, filed the following petition to the judge of the court below, for a writ of *habeas corpus*, viz. :

“Robert Flora respectfully represents and complains, that he is now, and has been for the last two days, restrained of his liberty by one William Sachs, who is the marshal of the city of Vincennes, in said county; that said Flora, during the time aforesaid, has been by said Sachs confined and restrained of his liberty, in the city prison of said city, and situated on Fourth street in said city; that the pretended cause and reason for such restraint of said Flora, by said Sachs, according to the best knowledge and belief of said Flora, is as follows: That, on the 20th day of June, 1877, the said city of Vincennes recovered a judgment against the said Flora, for the sum of ten dollars, and costs of suit taxed at twenty-seven dollars and ninety-five cents, which judgment was recovered for and on account of a violation of an ordinance of said city, by said Flora; that, after the recovery of said judgment, on the 20th day of June, 1877, the said Flora was committed to the city prison of said city, for failing to pay or replevy said judgment and costs; and said Flora, while so in said city prison, was taken therefrom by the marshal of said city, and by his direction was put to work upon the streets of said city, under the direction and control of the street commissioner of said city, and that, while said Flora was so at work upon the streets of said city, he was allowed and permitted by said marshal and street commissioner, to escape and go at large; and the said Flora then left the city of Vincennes, and did not return thereto until about the month of August, 1877, since which date he has been in said city, a resident thereof, and has been almost daily upon the streets of said city, and in other public places therein, and has often met the marshal of said city, and the other officers thereof; and he has in no manner kept himself concealed from the said officers or any of them, but he could have been apprehended and taken into custody at any

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time, if his apprehension had been desirable; but that no attempts were ever made to arrest or take said Flora into custody on account of his escape from the custody of said marshal or street commissioner, as aforesaid, or on account of his failure to pay the said judgment recovered against him by said city, until the 6th day of March, 1879, when the said William Sachs, as the marshal of said city, without any writ, warrant or process of any kind or character having been issued or delivered to him, arrested and took the said Flora into his custody, for the reason, as stated and asserted by the said Sachs, that said Flora had not paid or replevied the said judgment recovered by said city against said Flora; and that this is the sole and the only cause or reason for the arrest or restraint, by said Sachs, of said Flora, as he is informed and verily believes."

The petition adds, that the petitioner believes his arrest and restraint are illegal, and prays for the writ of *habeas corpus*, and that the petitioner may be discharged from the imprisonment, etc.

The writ was issued, and the defendant, Sachs, at the time appointed, appeared before the judge, produced the body of Flora, and moved that the writ be quashed, upon the ground that the matters alleged were not sufficient to authorize the issuing of the writ, which motion was sustained, and Flora was remanded to the custody of the marshal.

Flora excepted, and appeals to this court.

We have no brief for the appellee, and are not advised upon what ground the petition was supposed to be defective. It seems to us to have been sufficient.

On the facts stated, the marshal had no right or authority to re-arrest or detain Flora by reason of the judgment and commitment of June 20th, 1877. A person can only be committed for the space of thirty days for failing to pay or replevy such judgment. 1 R. S. 1876, p. 274, sec. 20. The thirty days, we think, must run from the date of the

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judgment, after which time the party thus committed is entitled to his liberty ; and this, whether the judgment has been paid or replevied, or otherwise, or whether, in the mean time, the party committed has been continuously in custody, or has during that time made an escape.

We decide nothing as to the question whether a marshal may, before the expiration of the thirty days, retake one who has made a voluntary escape, and detain him until the expiration of the thirty days. But where there is an escape during the thirty days, the marshal has no authority, after the expiration of that time, to recapture and imprison the party by virtue of the original judgment and commitment. There can be an imprisonment of only thirty days altogether. The time must be the thirty days next after the rendition of the judgment, and it can not be made up of disconnected periods, some before and some after the expiration of the thirty days.

The following is enough of the section of the statute, above cited, to show the ground upon which the decision must rest :

“ If the penalty or forfeiture in which judgment is obtained is not paid or replevied, the defendant may be committed, for any period not exceeding thirty days, to the workhouse of such city, or, if such city have no workhouse, then to the county prison of the county in which such city is situated ; and, in the latter case, it shall be the duty of the person having charge of such prison, to receive such defendant and obey the judgment of the city judge or mayor’s court in reference to him or her ; and, in default of payment or replevy of such judgment and costs, the defendant, unless a female, may be adjudged and required to pay the same by manual labor in said workhouse or in the street, or other public works of said city, under the control of the street commissioner or marshal of such city, for which labor such defendant shall be allowed, on

such judgment and costs, seventy-five cents per day. It shall be the duty of such street commissioner or marshal, or such other officer as the common council may direct, to work such defendant not less than six nor more than ten hours per day, according to the season, and each evening to return him to the custody of the keeper of such prison or workhouse; and upon the full payment, as aforesaid, of judgment and costs, such defendant shall be fully discharged; \* \* \* and such defendant may, at any time, replevy and pay such judgment and costs, and in case he has performed labor under such judgment, he shall be entitled to a credit for the same to the amount of labor performed, and the balance may be paid or replevied as aforesaid."

It is apparent from an examination of the statute, that two modes of enforcing the payment of such judgments were contemplated by the Legislature.

The first is designed to coerce payment in money, and not in labor. It is by imprisonment in the workhouse or county prison for a period not exceeding thirty days, the judgment not being paid or replevied. This imprisonment is designed to induce payment in money, by the defendant in such case, rather than submit to the imprisonment. The defendant, in such case, is not entitled to credit on the judgment on account of such imprisonment, so far as this section of the statute is concerned, or, indeed, any other statute of which we have any knowledge. But the imprisonment can not be for a longer time than that specified, though the judgment and costs may amount to much more than could be worked out in thirty days at the rate per day specified, and though the judgment and costs at the end of the thirty days should remain wholly unpaid or replevied.

This power of imprisonment may be applied to females as well as to males.

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The second mode is to require payment by the labor of the defendant in such case. This mode can only be applied to males. But before one can be required to pay such judgment in labor, there must be an adjudication by the mayor or city judge to that effect. See *Tuley v. The City of Logansport*, 53 Ind. 508. When there has been such an adjudication, the judgment, including costs, not being paid or replevied, the defendant may be required to work it out at the rate per day provided for, though it may require a longer time than thirty days. It seems also to us that a defendant, in such an adjudication, might be required to work out the full amount, unless it were otherwise paid or replevied, although he might escape, and for a time fail to perform any work. The question in such case would not be so much one of time or length of imprisonment, as one of amount due upon a judgment to be paid in labor.

This construction renders the statute harmonious and consistent with itself. Otherwise, the limitation of imprisonment to thirty days is inconsistent with the right to adjudge that the defendant, in such case, pay the judgment and costs in labor, at the rate per day specified, though a longer period would be required for that purpose. An imprisonment is contemplated in securing the performance of the labor. But this is not the thirty days' imprisonment provided for by the first part of the section.

We do not understand from the petition that there was any adjudication rendered, that the appellant pay the judgment and costs which the city obtained against him, by his labor, in accordance with the statute, and are therefore of opinion, that he could not be detained longer than the thirty days, as before stated.

For the foregoing reasons, we are of opinion that the judge below erred in quashing the writ.

The judgment below is reversed, with costs, and the

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cause remanded for further proceedings, in accordance with this opinion.

ON PETITION FOR A REHEARING.

WORDEN, J.—The appellee has filed a petition for a rehearing in this cause, in considering which we do not desire to add any thing to what was said in the original opinion as to the construction of the statute involved.

But it is insisted that the complaint or petition for the writ of *habeas corpus* was insufficient, because it did not aver that there had been no judgment that the appellant pay the judgment by labor, as provided for by the statute.

It is said in the petition for a rehearing, that "The complaint or petition does not affirmatively aver, nor could it do so truthfully, that said judgment was not in addition to the amount to be paid, also that, in default of payment or replevy, it should be discharged by appellant, by work and labor, as authorized by the statute. Having failed to negative this, it was deficient, and the court below rightfully so held."

It was alleged in the complaint for the writ, "That the pretended cause and reason for such restraint of said Flora, by said Sachs, according to the best knowledge and belief of said Flora, is as follows:

"That, on the 20th day of June, 1877, the said city of Vincennes recovered a judgment against the said Flora for the sum of ten dollars, and costs taxed at \$27.86, which judgment was recovered for and on account of a violation of an ordinance of said city, by said Flora; that, after the recovery of said judgment, on the 20th day of June, 1877, the said Flora was committed to the city prison of said city, for failing to pay or replevy said judgment and costs," etc.

The statute requires that the complaint for the writ shall specify "The cause or pretence of the restraint, according:

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to the best of the knowledge and belief of the applicant." 2 R. S. 1876, p. 290, sec. 715, clause 2.

The complaint in this case complied with the statute. The cause of restraint set forth was the recovery of the judgment against the appellant for the violation of the city ordinance, and his committal for a failure to pay or replevy the judgment and costs. This excluded the idea that there was any other or different ground for the restraint, or that there was any other or further judgment, than that for the recovery of the ten dollars and costs. It excluded, in other words, the idea that there was any judgment that the appellant be required to pay the judgment and costs in labor, as provided for by the statute.

It may be observed, that, if there was a proper judgment rendered that the appellant be required to pay the judgment and costs by his manual labor, as contemplated by the statute, the matter can be shown by a proper return to the writ.

The petition for a rehearing is overruled.

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**WATERCOURSE.**—*Wabash River Navigable.*—*Riparian Ownership.*—*United States Lands.*—The Wabash river is a navigable stream, the bed of which has neither been surveyed nor sold.

**CONVEYANCE.**—*Description.*—*Mistake.*—*Reforming Deed.*—*Congressional Surveys.*—*Supreme Court.*—*Judicial Notice.*—*Action to Recover Real Estate.*—A conveyance of a certain tract of land described the same as "The south-west fraction of section 17, town 22, range 6 west," in Warren county, Indiana, "except 20 acres off of west side of above described south-west quarter" section;—such section being a portion of the public lands surveyed, platted and sold by the United States, and being so traversed by the Wabash river, in a south-westerly direction, as to cut off an irregularly

64	168
136	403
64	168
147	497

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shaped portion of the south-east corner of the south-west quarter thereof as shown by the plat of the government survey.

*Held*, in an action by one claiming under such deed, against the heirs of the grantor, to reform the description in such deed and to recover possession, that such description is sufficient without reformation.

*Held*, also, that the Supreme Court takes judicial notice of the location of the counties of this State, and that the description "Town 22" in such deed is equivalent to "Town 22 North."

From the Warren Circuit Court.

*L. T. Miller, W. P. Rhodes, R. C. Gregory and W. B. Gregory*, for appellant.

*J. M. Rabb*, for appellees.

NIBLACK, J.—This was an action to reform a deed, to quiet title, and to recover the possession of certain real estate.

The complaint contained three paragraphs.

The first paragraph alleged, that one William J. James was, on the 27th day of January, 1871, seized in fee-simple and in the possession of a tract of land lying in Warren county, described as follows:

"All that portion of the south-west quarter of section 17, in township 22 north, range 6 west of the second principal meridian, which lies in said county of Warren, and north of the Wabash river (except 20 acres off the west side of said quarter section, being a slip of 160 rods long, running north and south, by 20 rods wide, running east and west,) containing 97 and  $\frac{1}{100}$  acres;" and that, on that day, the said James, together with his wife, Sarah James, sold and conveyed said tract of land to one Henry C. Dawson; that, in conveying said tract of land, the said James and wife erroneously described it as "being the following real estate in Warren county, Indiana, described as follows: The south-west fraction of section 17, town 22, range 6 west, \* \* \* except 20 acres off of west side of above described south-west quarter;" that, on the 15th day of September, 1878, the said Henry C. Daw-



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son sold and conveyed the tract of land above referred to, and correctly described, to Charles J. Dawson, the plaintiff; that, since his conveyance of said land to the said Henry C. Dawson, the said William J. James had died intestate, leaving the defendant Sarah James, above named, as his widow, and the other defendants, Ellen Collier, intermarried with Isaac Collier, Irving James and Charles F. James, as his only children; that the said William J. James put the said Henry C. Dawson into the possession of the land first above described at the time he conveyed the same to him, said Dawson; that the defendants denied the title of the plaintiff to said land, and claimed the same adversely to the plaintiff. Wherefore the plaintiff prayed that the deed from the said William J. James to the said Henry C. Dawson might be reformed, and that his title might be quieted.

The second paragraph was in the usual form for the recovery of the possession of real estate, describing the land as "The south-west fraction of the south half of section 17, in township 22 north, of range 6 west, in the district of lands offered for sale at Crawfordsville, Indiana, containing one hundred and seventeen acres and forty-five hundredths of an acre, according to the official plat of the survey of said lands returned to the general land-office by the surveyor general, except twenty acres off the west side, leaving ninety-seven and forty-five one-hundredths acres."

The third paragraph gave a history of the plaintiff's title, substantially the same as given in the first paragraph, concluding with a demand for the recovery of the possession of the land in controversy.

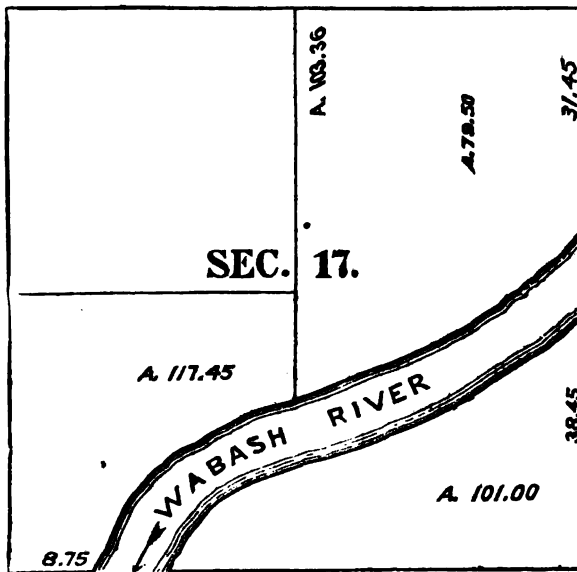
The defendants answered in general denial; also in several special paragraphs.

Issue being joined, the cause was submitted to a jury for trial.

Verdict for the defendants.

Motion for a new trial overruled, and judgment on the verdict.

Upon the trial, the plaintiff, amongst other things and in connection with considerable oral testimony, gave in evidence the deed from William J. James to Henry C. Dawson; also the deed from said Dawson to the plaintiff; also the plat of the original survey of said section seventeen, which was substantially as follows:



At the proper time the court instructed the jury, that "The deed from James to Dawson, of date of 27th of January, 1871, conveys nothing by the description, 'south-west fraction of section 17, town 22, range 6 west, in Warren county, Indiana,' and does not, by the language used in it, convey the land in dispute to Dawson."

The giving of this instruction, being properly excepted to, was assigned as one of the causes for a new trial, and the exception thus reserved to the instruction constitutes

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the only question discussed by the appellant, at the present hearing.

The descriptive part of a deed is to be construed with reference to the actual state of the property conveyed by it at the time of its execution, and the parties are supposed to refer to this for a definition of the terms made use of in the deed. 3 Washb. Real Prop. 384.

The land in dispute in this action was originally a portion of the public lands of the United States, which were laid off and platted into townships, sections and smaller subdivisions, and which have been offered for sale and sold according to the descriptions afforded by the surveys and plats of such lands, made and perpetuated under authority of law. 1. U. S. Stat., p. 464, and 2 U. S. Stat., p. 73.

The plat in evidence in this case gives a description of the location, situation and subdivisions of the section of which the land in suit constitutes a part, at the time such land was sold by the United States, and at the time it was conveyed by James to Dawson.

As has been seen, the Wabash river, a navigable stream, the bed of which has neither been surveyed nor sold, runs through this section, and cuts three of its quarter sections into fractional parts. In applying the points of the compass to this section, we must imagine ourselves as standing in the middle of the section. From that stand-point one fractional part lies mainly to the north-east, another principally to the south-east, and the remaining one to the south-west. This latter fractional part embraces all of the south-west quarter of this section, which lies north and west of the river, and when the south-west fraction of this section is referred to, that part of the south-west quarter of it lying north and west of the Wabash river is necessarily implied. But, aside from this construction of the plat in evidence, the reservation attached to the description in the deed from James to Dawson seems to us to

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sufficiently indicate the portion of the section in which the land intended to be conveyed by it lies.

This reservation says, "except 20 acres off of west side of above described south-west quarter;" thus making it manifest that the parties understood the phrases "south-west fraction" and "south-west quarter" as referring to and describing the same tract of land. Stating the land to be in town 22, in Warren county, Indiana is equivalent to describing it as in town 22 north, as we must take judicial notice of the location of Warren county, with reference to ranges and congressional townships.

We are unable to see that the deed from James to Dawson needs any reformation. *Key v. Ostrander*, 29 Ind. 1; *The German M. Ins. Co. v. Grim*, 32 Ind. 249; *Bowen v. Wood*, 35 Ind. 268.

From what has been said, it is evident that the instruction given by the court in this case can not be sustained.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

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**WATERCOURSE.—Obstruction of.—Action by Administrator for Damages.—**

**Pleading.—Heir.**—In an action by one styling himself administrator of the estate of a deceased land-owner, against an adjoining proprietor, for obstructing the passage of drift-wood theretofore carried across the lands of both by the overflow of an adjacent river during freshets, the complaint averred, that the plaintiff, by inheritance from the decedent, was the sole owner of the lands injured by such obstruction.

**Held**, on demurrer, that such action can not be maintained by the plaintiff as administrator, but that the averments of the complaint show a right of action in him personally.

**SAME.—Rights of Administrator in Lands of His Decedent.**—In this State, an administrator has no rights, as such, in the lands of his decedent, except

64	167
124	316
64	167
128	590
64	167
142	617
64	167
182	21
64	167
164	444
164	446
64	167
168	212

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to subject the same to the payment of debts, if necessary, or in the absence of heirs or devisees.

**SAME.—Riparian Proprietor.—Property of, in Watercourse.**—A riparian proprietor has a mere usufruct property in water flowing over his lands in its regular channel.

**SAME.—Subterranean Water.—Surface-Water.—Overflow During Freshets.**—Water which percolates through the soil, beneath the surface, without a known channel, water which temporarily flows upon or over the surface, from the falling of rains and the melting of snows, without a channel, but simply as the natural or artificial elevations and depressions may guide it, and water temporarily flowing from a watercourse, over adjacent lands, without a channel, on the overflow of such watercourse by reason of freshets, forms part of the realty and belongs to the owner thereof.

**SAME.—Obstructing Overflow Carrying Drift-Wood.**—The proprietor of certain lands sued an adjoining proprietor for obstructing the passage of drift-wood carried by the overflow of an adjacent watercourse during freshets, by planting a row of trees upon the land of the defendant, and along the line dividing their lands, by means of which the drift-wood was lodged upon the lands of the plaintiff.

*Held*, that no action lies for such obstruction.

From the Vanderburgh Circuit Court.

A. L. Robinson, for appellant.

J. M. Shackelford and R. D. Richardson, for appellee.

BIDDLE, J.—The appellant entitled this case, "Samuel C. Taylor, administrator of the estate of Martha E. Taylor, deceased," etc., and filed the following complaint:

"Samuel C. Taylor, administrator aforesaid, complains of John H. Fickas, and says, that on the 11th day of December, 1866, the said Martha E. Taylor, whose name was then Martha E. James, became the owner in fee-simple, and entered into possession, of the following described tract of land, viz.: forty-five and ninety-one one-hundredths acres, out of the middle of the north-east quarter of section No. eleven (11), in township No. seven (7) south, range No. ten (10) west, being that part of said quarter section set off and allotted to Mrs. Emily R. James, as widow of Nathaniel J. James, in a suit for partition in the court of common pleas of said county, during the November term,

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1859, as appears by the report of commissioners in said suit, and the plat filed with the said report, all of which is recorded in partition record No. 1, on page No. 108, to which the plaintiff refers for a more perfect description of said land, situated in said county; and that the said Martha E. continued to own and possess the said land, until the 7th day of December, 1874, when she departed this life intestate, leaving the said plaintiff her husband and sole heir of her said estate, and afterwards, to wit, on the 11th day of April, 1877, the plaintiff was in due form appointed administrator of the estate of the said decedent.

"The plaintiff further avers, that, during the year 1862, the defendant became the owner and entered into possession of the following described tract of land, viz.: Fifty-nine acres off of the west side of the said north-east quarter of said section eleven (11), lying west of and adjoining the said land of decedent; that said tracts of land lie in strips, each half a mile in length, running north and south, and are situated near the Ohio river, in said county, and are a part of the overflowed bottom lands near and adjacent to said river, and that, from time immemorial, a large extent of country in the vicinity of said tracts of land, and including the same, has been and still is liable to be overflowed with water from the said river, after and during excessive rains in the valley of the said river; that, during said times of high-water and overflow, the water from the said river runs over the said tracts of land with a strong and rapid current, the general current of the same running from east to west, first over the land of decedent, and then over that of the defendant; the water in said current over said land varying in depth from two feet to ten feet, and that the water (which is in fact a portion of the said river) has run in that manner during seasons of high-water and during times of overflow, from time immemorial, and that the same would have continued so

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to run but for the wrongful acts of the defendant hereinafter described.

"The plaintiff further avers, that, during all the times of high-water and overflow of said river, great quantities of drift-wood have floated in the said current, over the said tracts of land, without injury to the same, and would have continued so to float but for the wrongful acts of the defendant hereinafter described.

"The said tracts of land during the years hereinafter named were cleared and in cultivation, and of great value, to wit, of the value of one hundred dollars per acre; that the defendant, to protect his said tract of land from drift-wood, in the year 1864, wrongfully and unlawfully planted, and has since continued and maintained, a row of trees on his said land, on or near and within a few inches of the line dividing said tracts of land, in a continuous row or line, running north and south for a distance of half a mile, the said trees being planted only two feet apart, along the whole length of the line dividing said tracts of land.

"That, at the time when the decedent purchased and entered into the possession of the tract of land first above described, the said trees were of small size, having recently been planted, and were not of sufficient size to form the obstruction of said current, as hereinafter described; that during eight years, to wit, from the year 1867 to the year 1874, both included, the said trees, so wrongfully and unlawfully planted and maintained by the defendant, having grown to a sufficient size and strength, prevented the drift-wood floating in the said current during times of high-water and overflow in said river from flowing over and away from the land of decedent and from the land of the defendant. And during all those years the drift-wood which would have floated over and away from said decedent's land, and from the defendant's land, lodged upon

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and against the said trees, and upon said decedent's land, in large quantities, so that a dam has been and was formed against said trees, and upon decedent's lands, by means whereof a large area of said land, to wit, five acres, became covered with trees, logs, stumps, brush and trash, which floated and lodged there during said years in times of high-water and overflow, and covered the said five acres with said drift-wood and trash, to the depth of from two feet to ten feet, and which so remained covered at the time of the decease of the said Martha E., by reason whereof the said land became and was worthless and of no value.

"And the plaintiff further avers, that, by the obstruction aforesaid, the water was prevented from flowing off of said land of decedent, and remained stagnant, and the decaying wood and trash, so piled upon the said land by the means aforesaid, rendered the same unhealthy and unfit for a human habitation.

"By means whereof the plaintiff avers, that the said decedent sustained damages to the amount of two thousand dollars, for which he demands judgment, and for all other proper relief."

The appellee filed a demurrer to the complaint, for that it does not state facts sufficient to constitute a cause of action.

The demurrer was sustained, the parties stood by their pleadings, and the court rendered final judgment for the appellee.

If this complaint was brought solely in the right of an administrator, the action would not lie. An administrator can not sue for an injury to the freehold. *Emerson v. Emerson*, 1 Vent. 187; *Toller Executors*, 159; *Hill v. Penny*, 17 Maine, 409. By the common law, lands went to the heir, not to the administrator. 2 Bl. Com. 201. In the State of Indiana, the administrator has no right in the



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lands that descended to the heir, except upon the contingency that the personal estate is insufficient to pay the debts against the deceased, or in the absence of heirs or devisees. 2 R. S. 1876, pp. 519, 535, secs. 75, 110. And this is the general American doctrine. The appellant can not maintain the case as an administrator; but, in the body of the complaint he avers that he is the sole heir of the decedent, and that the lands alleged to have been injured have descended to him. As an heir, he may bring the action.

The property in water that passes along and through a watercourse which has a bed, channel and banks, where it usually flows, is a mere usufruct interest, continuing only while the water is passing over the lands of the owner. He has the right to receive it where the watercourse, in its natural channel, enters his land, and to use it while it is passing over his lands; but he is required to return it to its channel when it leaves his land. 2 Bouvier Law Dictionary, p. 656; Angell Watercourses, secs. 94, 135. The property in the lost water that percolates the soil below the surface of the earth, in hidden recesses, without a known channel or course, and property in the wild water that lies upon the surface of the earth, or temporarily flows over it as the natural or artificial elevations or depressions may guide or invite it, but without a channel, and which may be caused by the falling of rain or the melting of snow and ice, or the rising of contiguous streams or rivers, fall within the maxim that a man's land extends to the centre of the earth below the surface, and to the skies above, and are absolute in the owner of the land, as being a part of the land itself. Angell Watercourses, sec. 108, and notes and authorities there cited. See, also, *The New Albany and Salem R. R. Co. v. Peterson*, 14 Ind. 112, and *The City of Greencastle v. Hazelett*, 23 Ind. 186.

In the complaint before us, there is no averment of any watercourse, except, indeed, by way of parenthesis, that

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the place, during floods, is a part of the Ohio river; but the facts averred clearly show that it is not upon the bed of the river, nor within its channel, nor between its banks; in short, that it is no part of a watercourse, but that the flow is over the entire surface of the land, is occasioned by temporary causes, and is not usually there. The rights of the appellee, therefore, are such as a proprietor may have in surface water, which, as we have seen, is a part of his land; and the injuries or inconveniences which the appellant is alleged to have suffered are such as arise from the changes, accidents and vicissitudes of natural causes. These rights and liabilities are so well defined by BIGELOW, C. J., in the case of *Gannon v. Hargadon*, 10 Allen, 106, that we adopt the definition as our own:

“The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owner that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into or over the same in greater quantities or in other directions than they were accustomed to flow.”

Again, from the same cause:

“The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil.”

In delivering the opinion, in the case of *Goodale v. Tuttle*, 29 N. Y. 459, DENIO, C. J., said:

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"And in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well settled rule that the owner of land has full dominion over the whole space above and below the surface."

The maxim, that every one must so enjoy his property as not to injure the property of another, so earnestly insisted upon by the appellee, means no more than that every one must so enjoy his property according to his legal right, as not to injure the legal right in the property of another. It is sometimes impossible for the owner to use his property within his legal right, without, in some slight degree at least, injuring the property of another. Such a case is not within the maxim, provided it does not injure a legal right in the property of another.

We adopt the following language from a case cited herein: "The elements being for general and public use, and the benefit appropriated to individuals by occupancy, this occupancy must be regulated and guarded with a view to individual rights of all who have an interest in their enjoyment; and the maxim, *Sic utere tuo, ut alienum non lædas*, must be taken and construed with an eye to the natural rights of all; and, although some conflict may be produced in such uses and enjoyments, it is not considered, in judgment of law, an infringement of the right."

In the case of *Chatfield v. Wilson*, 28 Vt. 49, it is said: "The maxim, *Sic utere tuo, ut alienum non lædas* applies only to cases where the act complained of violates some legal right of the party; \* \* \* and it may be laid down as a position not to be controverted, that an act legal in it-

self, violating no right, can not be made actionable on the ground of the motive which induced it."

The case which seems most nearly to support the views of the appellant is *Gillham v. The Madison, etc., R. R. Co.*, 49 Ill. 481.

The question in that case, as in this, arose upon sustaining a demurrer to the complaint. The facts in that case were as follows: The appellant was the owner of a tract of land less elevated than the land in the neighborhood, from which all the water that fell upon it from rains, or otherwise flowed on the land, and which, by means of a depression in the surface, ran off his land to adjoining lands, and thence into a natural lake. The appellee made a large embankment on the line of the appellant's land, entirely filling this channel, thereby throwing the back-water on the appellant's land.

In this case the complaint was for obstructing a depression in the ground, or a channel, not for obstructing the entire surface for a half mile, where no channel is alleged, as in the case before us.

The true doctrine in such a case, we believe, was expressed by the CHANCELLOR, in the case of *Earl v. De Hart*, 1 Beasley, 280: "If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural watercourse."

It is plain that the facts averred in the complaint we are considering do not fill the law as expressed above.

The doctrine contended for by the appellant, applied to the vast alluvial regions—so generally level, and subject

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to occasional inundations—bordering upon the Ohio river, and lying along other rivers and large streams within this State, would very much embarrass agriculture and general improvement, by preventing proprietors of lands from securing their fences by planting trees, or by other permanent methods, and in some instances, perhaps, render large portions of our richest soil useless. While the owners of lands may not obstruct watercourses to the injury of others, they must be permitted to fence and cultivate their fields and improve their lands in the way which best subserves their interests, without being responsible for the accidents of floods, or the shiftings of surface water occasioned thereby, although sometimes slight and temporary injuries may result therefrom to adjoining owners. These are accidents which must be borne alike by all.

We think the law has thus wisely discriminated between the rules which apply to watercourses, and those which apply to surface waters. The following authorities, in addition to those cited above, support this opinion: *Shields v. Arndt*, 3 Green Ch. 234; *Chasemore v. Richards*, 2 H. & N. 168; S. C., 5 H. & N. 982; *The City of Bangor v. Lansil*, 51 Maine, 521; *Greeley v. The Maine Central R. R. Co.*, 53 Maine, 200; *Kauffman v. Griesemer*, 26 Pa. State, 407; *Bates v. Smith*, 100 Mass. 181; *Emery v. City of Lowell*, 104 Mass. 13; *Luther v. The Winnisimmet Co.*, 9 Cush. 171; *Ashley v. Wolcott*, 11 Cush. 192; *Parks v. City of Newburyport*, 10 Gray, 28; *Flagg v. City of Worcester*, 13 Gray, 601; *Dickinson v. City of Worcester*, 7 Allen, 19; *Wheeler v. City of Worcester*, 10 Allen, 591; *Goodale v. Tuttle*, 29 N. Y. 459; *Wagner v. Long Island R. R. Co.*, 5 N. Y. (Thompson & Cook) 163; *Buffum v. Harris*, 5 R. I. 243; *Beard v. Murphy*, 37 Vt. 99; *Swett v. Cutts*, 50 N. H. 439; *The Conhocton Stone Road Co. v. The Buffalo, New York and Erie R. R. Co.*, 3 Hun, 523; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Bowlsby v. Speer*,

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81 N. J. 351; *Rawstron v. Taylor*, 11 Exch. 369; *Hoyt v. The City of Hudson*, 27 Wis. 656; *Barnes v. Sabron*, 10 Nev. 217; *Imler v. City of Springfield*, 55 Mo. 119; *Jones v. Hannovan*, 55 Mo. 462.

The court did not err in sustaining the demurrer to the complaint.

The judgment is affirmed, at the costs of the appellant.

Petition for a rehearing overruled.

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**PRACTICE.—Demurrer Waived by Pleading.**—Where a party who has filed a demurrer to a pleading pleads thereto before his demurrer has been ruled upon, he thereby waives his demurrer.

**JUDGMENT.—Copy.—Exhibit.—Pleading.**—A judgment pleaded in bar of an action is not a "written instrument" within the meaning of section 78 of the practice act, and neither it nor a copy thereof need be filed with the pleading.

**PROMISSORY NOTE.—Payable in Bank.—Separate Actions Against Endorsers and Makers.—Jurisdiction.**—The *bona fide* endorsee, for value and before maturity, of a promissory note payable in bank, may maintain separate actions, and recover separate judgments, against each party liable thereon; but no two actions thereon can be brought at the same term of court, and any action thereon, to which the maker is a party, must be brought in the county where he resides.

**SAME.—Recovery Against Endorser no Bar to Action Against Maker.**—The recovery of a judgment by such holder, against an endorser, on such note, is no bar to a subsequent action thereon against the maker.

From the Bartholomew Circuit Court.

*F. T. Hord*, for appellants.

**Howk, C. J.**—In this case the appellants, partners under the name and style of the "Indiana Banking Company," sued the appellee on a promissory note executed by him to the order of one Charles S. Boynton, and endorsed by the latter to the appellants.

Of this note the following is a copy:

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"APRIL 29th, 1873.

"On or before the 25th day of Dec., 1875, I promise to pay to the order of Charles S. Boynton, negotiable and payable at the First National Bank of Columbus, Ind., one thousand and fifty dollars, with interest at the rate of ten per cent. per annum after maturity, value received, without any relief whatever from valuation or appraisal. The drawers and endorsers severally waive presentment and notice of protest or non-payment of this note.

(Signed,)

"ADAM FISHEL."

In their complaint the appellants alleged, that said Charles S. Boynton, the payee of said note, before its maturity, for value, assigned said note, by endorsement in writing, to the appellants.

The appellee answered in two paragraphs, to each of which the appellants demurred upon the ground that it did not state facts sufficient to constitute a defence to their action.

The demurrer to the first paragraph of said answer was not decided by the court, but the appellants replied thereto.

The court overruled the demurrer to the second paragraph of said answer, and to this ruling the appellants excepted; and, failing and refusing to reply to said second paragraph, the court rendered judgment on their demurrer thereto, against the appellants and in favor of the appellee, for the costs of suit, from which judgment this appeal is now prosecuted.

The following decisions of the circuit court have been assigned as errors by the appellants, in this court:

1. In overruling their demurrer to the first paragraph of appellee's answer; and,

- 2 In overruling their demurrer to the second paragraph of said answer.

The record fails to show any decision by the circuit court

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of the appellants' demurrer to the first paragraph of the answer, or that they excepted to any decision thereon. It appears from the record, that, before the court made any ruling upon the demurrer to the first paragraph of the answer, the appellants filed their reply thereto. In this state of the record, we must assume that the appellants waived their demurrer to the first paragraph of the appellee's answer. *Gordon v. Culbertson*, 51 Ind. 334. The first error assigned by the appellants, in this court, is therefore not found in the record.

In the second paragraph of his answer, the appellee alleged, in substance, that he executed the note in suit to Charles S. Boynton, and that the same was made payable in the First National Bank of the city of Columbus, Indiana; that the said Charles S. Boynton resided in Marion county, Indiana, on the — day of —, 187—; that, on said last named day, said Boynton sold and assigned said note to the appellants, and endorsed the same to them; that afterward, on the 25th day of January, 1876, the appellants brought suit on said note, in the Marion Superior Court, against said Charles S. Boynton, as such endorser, and took a personal judgment thereon against said Boynton, and not against any other person, nor against the appellee; that said judgment, so rendered in said Marion Superior Court, against the said Boynton, remained unreversed and not appealed from, and the said Boynton, as such judgment debtor, still remained personally and individually liable to the appellants for said debt evidenced by said note, and the goods and chattels of said Boynton remained and were liable to the appellants, upon execution, for the payment of said debt; and the appellee averred, that the said Boynton, endorser as aforesaid, was solvent and able to pay off and discharge said debt; that, by said suit and said judgment, the appellants had extinguished the appellee's indebtedness to the appellants; that the ap-



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pellee was unable to make the record of the suit and judgment of the Marion Superior Court a part of this answer, because the facts in connection therewith had not come to the appellee's knowledge, until that term of the court below; and that, since then, the appellee had not had time to procure said record. Wherefore, etc.

It was unnecessary for the appellee to make a copy of the record of the Marion Superior Court a part of the second paragraph of his answer. Such record was not a "written instrument," within the meaning of section 78 of the practice act, which provides that, "When any pleading is founded on a written instrument, \* \* \* the original, or a copy thereof, must be filed with the pleading." 2 R. S. 1876, p. 73. *Wilson v. Vance*, 55 Ind. 584; *Richardson v. Jones*, 58 Ind. 240. If the second paragraph of the answer stated facts sufficient in other respects to constitute a defence to the appellants' action, the appellee's failure to make the record of the Marion Superior Court a part of said paragraph would not render it defective or insufficient.

It seems very clear to us, that the facts stated in the second paragraph of the appellee's answer were not sufficient to constitute a defence to the appellants' action. The suit, as we have seen, is by the endorsees, against the maker of a note negotiable by the law merchant. The appellants claim in their complaint, that the note was endorsed to them by the payee thereof, in good faith, for value, and before maturity, and these facts are not controverted by any averment in the second paragraph of the appellee's answer. In such a case the law is well settled, that the endorsees take such note free from any and all equities and defences which may have existed between the maker and payee thereof. *Murphy v. Lucas*, 58 Ind. 360; *Bremmerman v. Jennings*, 60 Ind. 175; and *Bremmerman v. Jennings*, 61 Ind. 334.

We do not understand that the appellee intended, in and by the second paragraph of his answer, to run counter to the law as we have stated it. But we have no brief from the appellee in this court, and we may not clearly understand the nature of the defence which he intended to state in said paragraph. We learn from the brief of the appellants' attorney, that the court below, in its decision of the demurrer to this paragraph of answer, relied upon the opinion of this court in the case of *Archer v. Heiman*, 21 Ind. 29. That case, as we read it, can not have any possible bearing upon the question now under consideration, unless it can be said that the maker and endorser of a promissory note governed, as to its negotiability and the liabilities of such parties, by the law merchant are joint debtors to the endorsee of such note.

In section 16 of "An act concerning promissory notes, bills of exchange," etc., approved March 11th, 1861, it was provided as follows: "The holder of any note or bill of exchange, negotiable by the law merchant, or by law of this State, may institute one suit against the whole or any number of the parties liable to such holder, but shall not, at the same term of court, institute more than one suit on such note or bill." By an act approved March 12th, 1875, this section 16 was amended by adding thereto a proviso, as follows: "*Provided*, That no judgment shall be rendered in such suit against any maker of such note, drawer or acceptor of such bill, unless suit is brought in the county where one or more of such makers, drawers or acceptors reside at the time such suit is begun." 1 R. S. 1876, p. 637.

In the case of *Archer v. Heiman*, *supra*, the note sued upon was not negotiable by the law merchant, and was the joint note of several makers. The main point decided in that case was, that a suit and judgment against one joint maker of a joint note would constitute a bar to another

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suit on such note against any other joint maker thereof, for the reason that the note was merged in the first judgment. The doctrine of the case cited is good law, in our opinion; but we fail to see that it is applicable to the case before us. The appellee and Boynton were not joint makers, nor were they joint endorsers, of the note in suit. Each of them was liable to the appellants, but their liability was not that of joint debtors, for the amount of the note in suit. Under said section 16 of the act of March 11th, 1861, before it was amended, the appellants might have sued the appellee and Boynton, under the facts alleged in the second paragraph of the answer, either in the Marion Superior Court or in the Bartholomew Circuit Court, in one and the same action, or they might have sued the appellee in the court below, and Boynton in the Marion Superior Court, in separate actions.

Under the section as amended by the act of March 12th, 1875, no judgment could be rendered against the appellee, as the maker of the note in suit, unless the suit was brought in the county where he resided when the suit was begun. The only limitation or restriction in the statute upon the right of the holder of a note to institute more than one suit thereon is, that he "shall not, at the same term of court, institute more than one suit on such note."

The appellee and Boynton were severally liable to the appellants, for the amount of the note in suit. The facts alleged in the second paragraph of the appellee's answer, in relation to the judgment recovered by the appellants against Boynton for the amount of the note, and to the solvency of Boynton, and that the judgment against him might be collected on execution, certainly do not constitute any defence whatever to the appellants' cause of action against the appellee. "It is not the recovery of the judgment alone which constitutes a bar to an action against another of the parties severally liable on the same

cause of action, but it is the recovery of the judgment and the payment of it together, which constitute the bar.

\* \* If there could be but one recovery, it would be in vain to say that the plaintiff might have several actions. But it is quite plain that there may be as many actions and judgments as there are parties severally liable " on the note or bill which constitutes the cause of action. *The First National Bank, etc., v. The Indianapolis Piano, etc., Co.*, 45 Ind. 5.

The second paragraph of the appellee's answer did not, we think, state facts sufficient to constitute a defence to the appellants' action; and for this reason the demurrer to said paragraph ought to have been sustained.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to sustain the demurrer to the second paragraph of the answer, and for further proceedings in accordance with this opinion.

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NESBITT v. TRINDLE ET AL.

**DECEASED.**—*Conveyance by Widow of Her Third.—Reconveyance to Her on Remarriage.—Rights of Her Widower.—Children by Previous Marriage.—Partition.*—One-third of the lands of an intestate having been duly partitioned to his widow, and the residue to his children by her, she then, with a view to a second marriage, without consideration and without delivering possession, conveyed her said third to another, by a warranty deed, and, having remarried, such grantee reconveyed the same to her, without consideration. She, having died intestate, left her second husband and such children by her previous marriage surviving her, whereupon he brought an action to partition such third.

*Held*, that he inherited one-third thereof.

**SAME.**—*Children.—Vested Rights.—Creditors.—Disinheritance.*—Children have no vested rights in lands owned by the parent in fee-simple, neither do they stand to him in the relation of creditors; for the parent may, if he choose, disinherit them.

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From the Noble Circuit Court.

*A. A. Chapin and L. E. Goodwin*, for appellant.

*I. E. Knisely*, for appellees.

PERKINS, J.—James H. Nesbitt filed his petition in the Noble Circuit Court for partition of the following parcel of land, viz.: “Twenty-three acres of land from off the south end of the west half of the south-east quarter of section five, in township thirty-five, range eleven east.”

The plaintiff was the husband of Harriet Nesbitt, late deceased, and the defendants Charles and Mary J. Trindle were infant children of said Harriet by a former husband, George Trindle, deceased. A guardian *ad litem* was appointed for said infant defendants.

A demurrer to the complaint, for want of facts, was overruled, and exception noted.

Answer :

1. General denial;
2. An affirmative paragraph.

Demurrer to the affirmative paragraph, for want of facts; overruled, and exception noted.

Reply in denial and by affirmative paragraphs.

Demurrer to the affirmative paragraphs for want of facts; overruled, and exception noted.

By agreement, the cause was submitted to the court for trial, with request for special finding, etc., which was made, as follows:

“The court finds, that one George Trindle died intestate, on the — day of —, 1870, seized in fee-simple of the west half of the south-east quarter of section five, in township thirty-five, range eleven east, in Noble county, Indiana, leaving as his only heirs Harriet Trindle, his wife, and the defendants, his only children; that afterward partition of said land was made between said Harriet and the said defendants, her children, and the twenty-three acres of land

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described in the complaint were set off to said Harriet, who had no other title thereto than such as she acquired by her marriage with said George Trindle; that afterward said Harriet engaged to marry the plaintiff, and while said engagement continued, to wit, on the 17th day of April, 1872, said Harriet, without any consideration whatever, and with a view of enabling her, after her contemplated marriage, to sell or otherwise dispose of said land as she chose, conveyed the same to one Jonathan W. Learned, with covenants of general warranty and consideration expressed in the deed of one hundred dollars; that afterward, on the 17th day of April, 1872, said Harriet married said plaintiff, and on the 26th day of April, 1872, said Jonathan W. Learned, in pursuance of the understanding between him and the said Harriet at the time said land was conveyed to him, reconveyed the same to her, by the name of Harriet Nesbitt, without any money consideration whatever from her to him; that, during the time that said Learned held the legal title to said land, said Harriet continued to hold, occupy and control it as before such conveyance; that afterward said plaintiff and said Harriet lived upon and occupied said land as a home, and enjoying the rents and profits thereof, and said plaintiff built an addition to the house thereon, of the value of one hundred and fifty dollars; that afterward, on the 12th day of April, 1874, said Harriet died intestate, leaving the defendants, her only children, and the said plaintiff, her husband, without any transfer of any kind having been made of said land, other than that hereinbefore stated.

“My conclusions of law upon the foregoing facts are, that said Harriet, at her death, held the land, by virtue of her marriage with George Trindle, and at her death the whole of it descended to the defendants, and that the plaintiff takes none of it as surviving husband of said Harriet.”

[Signed by the judge.]

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The court found for the defendants, and, by the final judgment rendered, quieted the title to the land in them.

The exception taken by the plaintiff reads thus :

“ To which judgment of the court, upon special finding, the plaintiff at the time excepted, and filed his bill of exceptions,” etc.

The affirmative paragraph of answer to the complaint, to which paragraph a demurrer was overruled, reads thus :

“ That, on the — day of —, 1870, George Trindle died intestate, the owner in fee-simple of the land in the petition described, leaving surviving him his widow, Harriet Trindle, and these defendants, his only heirs at law; that, on the 17th day of April, 1872, said Harriet Trindle and the petitioner intermarried; and the same day, before the marriage, said Harriet Trindle conveyed the undivided one-third of said land to one Jonathan Learned; and, on the 26th day of said month, said Learned reconveyed the same to her, by the name of Harriet Nesbitt; that said conveyance by her to said Learned was made without any consideration paid by him, and without any purpose or intention on the part of either to give him any interest in said land by purchase, gift or otherwise, but only that he might hold the title to said land for her until after her marriage, when he was to reconvey the same to her, which he did within a few days after it took place.

“ That she did not surrender the possession of said land to said Learned at any time, nor did he have any control over the same.

“ The said Harriet Nesbitt died during the coverture of her and petitioner, intestate, leaving surviving her the petitioner, her husband, and these defendants, the children of said former marriage.”

The prayer in the answer is for judgment, and to have defendants' title quieted.

The assignment of errors is as follows :

1. The court erred in overruling plaintiff's demurrer to the second paragraph of the answer ;

2. The court erred in its conclusions of law upon the facts specially found, in writing, at request of plaintiff; and,

3. The court erred in rendering judgment for defendants upon the facts so found.

What we shall say, in deciding this case, will be applicable to all these assignments of error, and will decide the questions of law as to all of them.

There are some established legal principles or rules of law. Among them are the following :

1. The children of a parent or parents, who, on the death of such parent or parents, may become his or her or their heirs, have no vested interest in the property of such parents, simply as such children, in the lifetime of such parent or parents.

2. Said children do not stand in the relation of creditors of their parents, who have credited such parents on the faith of their property.

3. The parents, or either of them, are under no legal obligation to bestow their property upon their children, and may bestow such property on others, and disinherit their children, if they please.

4. It is settled by judicial decision in this State, that a widow, while she is not the wife of a subsequent husband, may, at her pleasure, dispose of her separate property, even if such property came to her by virtue of a prior marriage. *Small v. Roberts*, 51 Ind. 281 ; *Piper v. May*, 51 Ind. 283 ; and *Swain v. Hardin*, ante, p. 85.

Proceeding now to the facts of the case :—

On the death of George Trindle, his real estate, under the law of this State, descended, one-third to his wife, and two-thirds to his children living, who were, with his wife, his heirs. On partition being made between his wife and children, the third set apart to his widow, late wife, became



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her property in fee-simple. Such property was that parcel of twenty-three acres described in the complaint in this suit. It was the absolute property, in fee, of Harriet Trindle. While she was unmarried, she conveyed said land, by deed in fee, to Jonathan W. Learned, who afterward reconveyed said land, by deed in fee, to Harriet Nesbitt, late Harriet Trindle.

The conveyance by said Harriet to said Learned was intended to and did convey to him the title in fee. The subsequent conveyance by him to Harriet Nesbitt was intended to, and did, convey to said Harriet the fee-simple in said land. At her death she owned said land in fee-simple, under the conveyance to her of the same by Jonathan W. Learned; and, under the law of this State, on her decease, leaving a husband and children, her heirs, one-third of said land descended to her said husband, and two-thirds to her said children; and, as a consequence, the suit of the husband for partition should have been sustained.

While said Harriet remained a widow, she had the right to dispose of said property, either for or without a consideration; her motives in the conveyance were not material; and she could not be chargeable with fraud upon her children, by conveying it, without consideration, because they had no legal interest in, or, at that time, right to, it. She did so dispose of it, and subsequently acquired it by a new title. After that she did not hold the land by virtue of her previous marriage, and the restriction upon her right to alienate, contained in section 18 of the statute of descents, ceased to be operative upon it; and the only right of her children to inherit it was contingent upon her owning it at her death. Restrictions upon the right of the owner to alienate his land are not to be favored.

The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

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Moser v. Long.

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135	131

**PROSECUTING ATTORNEY.**—*Circuit Prosecutor.*—*Constitutional Law.*—The office of the prosecuting attorney of a circuit court is one provided for by the constitution, which fixes the term of office at two years; and the Legislature can neither abolish the office nor abridge the term thereof.

**SAME.**—*Circuit Districting Act of 1878 Construed.*—*Effect of, on Prosecuting Attorneys.*—The act of March 6th, 1878, 1 R. S. 1878, p. 380, dividing "the State into circuits for judicial purposes, \* \* abolishing the courts of common pleas," etc., by implication provided that prosecuting attorneys of the several judicial circuits theretofore existing should continue to discharge their duties, as such, in the several circuits in which, under the new districting, they happened to reside.

**SAME.**—*Election of Prosecutor in 1878.*—Section 82 of such act contemplated the election, on the second Tuesday of October, 1878, of prosecuting attorneys for such new circuits only as had no prosecuting attorney residing within them, on the taking effect of the act.

**SAME.**—*Vacancy.*—*Appointee.*—Upon the resignation of a prosecuting attorney residing within a circuit created by such act, and the appointment of his successor by the Governor, after the taking effect of such act but prior to the second Tuesday of October, 1878, such appointee was entitled to hold the office until the election of his successor at the election held on the second Tuesday of October, 1874.

**SAME.**—The election of a successor to such appointee on the second Tuesday of October, 1878, was invalid.

**SAME.**—*Commission.*—A circuit prosecuting attorney elected at the general election in October, 1872, resigned, and his successor was appointed in April, 1878; such successor was elected as his own successor on the second Tuesday of October, 1878, and re-elected on the second Tuesday of October, 1874, and commissioned for terms ending respectively November 12th, 1875, and November 12th, 1877, but resigned on the 12th day of October, 1876. On the 14th day of November, 1876, the Governor, to fill the supposed vacancy, appointed A., who had been elected on the second Tuesday of October, 1876, and had been commissioned to serve for the two years expiring November 12th, 1879. On the second Tuesday of October, 1878, B. was elected and commissioned to serve for the two years commencing November 12th, 1878.

*Held*, in an action by B. against A., that, regardless of the dates fixed by A.'s commissions, B. was entitled to the office from Nov. 12th, 1878.

*Held*, also, that the appointment of A. of November 14th, 1876, was a nullity.

From the Knox Circuit Court.

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*Moser v. Long.*

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*S. W. Short, C. Baker, T. A. Hendricks, O. B. Hord and A. W. Hendricks, for appellant.*

*J. S. Pritchett and H. Burns, for appellee.*

WORDEN, J.—This was an amicable suit, instituted for the purpose of determining which one of the parties is entitled to the office of prosecuting attorney of the Twelfth Judicial Circuit of the State. The case was submitted on an agreed statement of the facts, as provided for by the statute. 2 R. S. 1876, p. 190, sec. 386.

The court, upon the facts agreed upon, found that the appellee, Long, was entitled to the office, and rendered judgment accordingly.

Moser excepted, and appeals.

As preliminary to a statement of the facts agreed upon, it is proper to observe, that, in 1872, the county of Daviess constituted a part of the Third Judicial Circuit; but by the act of March 6th, 1873, 1 R. S. 1876, p. 380, which took effect from and after its passage, that county became a part of the Twelfth Judicial Circuit.

The material facts agreed upon may be stated as follows:

1. At the October election, in 1872, Samuel H. Taylor was duly elected to the office of prosecuting attorney for the Third Judicial Circuit, and commissioned to serve for the term of two years from November 8d, 1872. He resided in Daviess county.

2. Taylor resigned the office April 18th, 1873, and on the same day John H. O'Neill was appointed by the Governor to fill the vacancy.

3. On the second Tuesday of October, 1873, John H. O'Neill was elected to the office of prosecuting attorney for the Twelfth Judicial Circuit, and was commissioned to serve for two years from November 12th, 1873.

4. At the general election held in October, 1874, O'Neill was elected to the same office, and commissioned to hold the same for two years from November 12th, 1875.

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5. On October 13th, 1876, O'Neill resigned the office, and, on the 14th of November of the same year, Ephraim Moser, the appellant, was appointed and commissioned by the Governor to fill the vacancy.

6. At the general election, held in October, 1876, Moser was duly elected to the office, and commissioned to serve for two years from November 12th, 1877.

7. At the general election, held in October, 1878, Long, the appellee, was duly elected to the office, and commissioned to serve for two years from November 12th, 1878.

It may be assumed that when the Twelfth Circuit was created by the act of March 6th, 1873, above noticed, taking in Daviess county, Taylor became the prosecuting attorney of that circuit. The 86th section of the act provides, that "The present judges of the circuit courts residing in the circuits created by this act, shall be judges of said court for the circuits herein provided." But, unless we have overlooked it, there is no such provision in relation to prosecuting attorneys.

The office of prosecuting attorney is provided for by the constitution, and the term thereof is fixed at two years. Art. 7, sec. 11, Constitution.

The Legislature, therefore, can not abolish the office nor abridge the term thereof, by a change of judicial circuits or otherwise.

In the case of *The State v. Tucker*, 46 Ind. 355, this court said, in speaking of the act above mentioned, dividing the State anew into judicial circuits: "By implication, the persons holding the office of prosecuting attorney continued to act as such in the circuit in which they happened to reside according to the new districting."

We need not determine what might have been the result if two prosecuting attorneys had, by the new districting, been thrown into one circuit. We are not advised that such was the case here.

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Taylor, then, by virtue of his election in 1872, and by virtue of the change of judicial circuits, throwing Daviess county into the Twelfth Circuit, became the prosecuting attorney for that circuit, and was entitled to hold the office for the term of two years from November 2d, 1872. But he resigned the office in April, 1873, and O'Neill was appointed by the Governor to fill the vacancy created by his resignation.

Now the question arises, whether the office thus held by O'Neill, by appointment, was properly filled by the election of 1873, or whether he held by the appointment until the office was filled at the regular biennial election of 1874.

The act above referred to abolished the court of common pleas, which had previously been in existence, and transferred the business thereof to the circuit courts. It divided the State anew into judicial circuits, and created, as was necessary, an increased number of circuits. In some of the circuits thus created, there were judges and prosecuting attorneys who continued to be judges and prosecuting attorneys in the new circuits in which they resided. In other circuits there were no such officers. In the latter cases, upon the taking effect of the act, it became the duty of the Governor to fill the vacancies by appointment. And it was provided by the 82d section of the act as follows:

"On the second Tuesday of October, 1873, a general election shall be held in the proper counties to elect judges and prosecuting attorneys in place of such judges and prosecuting attorneys as may be holding their office by appointment of the Governor, and such election shall be held and conducted under the laws and regulations governing general elections in this State."

It seems to have been the intention of the Legislature, that the offices of judge and prosecuting attorney in cir-

cuits created by that act, in which there were no such officers until supplied by the appointment of the Governor, should be filled at the election of 1873. As new circuits were created without judges or prosecuting attorneys, who were to be appointed by the Governor to hold until after an election, these seem to have been the circuits in which the Legislature intended that the election of 1873 should be held. The counties composing these circuits were "the proper counties" referred to in the section of the act above quoted. The biennial elections held in the years 1872, 1874, 1876, etc., were the regular and ordinary elections to fill all vacancies in office, and such as were held under an appointment, and all offices the terms of which would expire before the next regular election.

The election of 1873 was an unusual and extraordinary one, provided for a particular purpose; and the act providing for it should not be construed to extend beyond the occasion which called it forth. It was not, as we think, in the mind of the Legislature, that some judges or prosecuting attorneys in the circuits in which those officers existed under the new districting of the State might die or resign, and their places be filled by an appointment, before the election of 1873; and we think the extraordinary election thus provided for should not be held to apply in such cases.

It follows that the election of 1873 may be eliminated, and not taken into consideration, in determining the question involved. O'Neill then held the office under his appointment of April 18th, 1873, until his successor was elected at the regular biennial election of 1874. He was then elected his own successor, and by virtue of that election became entitled to hold the office for two years from November 12th, 1874. The mistake or error in his commission did not change the beginning or termination of his term. *Shannon v. Baker*, 33 Ind. 390; *The Board of*

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Carver *et al.* v. Carver.

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*Commissioners of Boone County v. The State, ex rel. Titus*, 61 Ind. 379.

At the general election in 1876, Moser was elected to the office. His term under the election commenced November 12th, 1876, when that of O'Neill terminated, and continued two years. O'Neill resigned his office a month before the expiration of his term, and Moser was, on November 14th, 1876, appointed. But this appointment seems to have been a nullity, because, two days before the appointment, Moser's term under his election commenced. Moser's commission should have run for the term of two years from November 12th, 1876, instead of 1877.

Long was duly elected at the general election of 1878, and his term commenced November 12th of that year.

The judgment below is affirmed, with costs.

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CARVER ET AL. v. CARVER.

**PROCESS.**—*Infant Defendants.*—*Jurisdiction.*—*Presumption.*—*Record.*—*Supreme Court.*—*Appearance after Verdict.*—Where, on appeal to the Supreme Court by the defendants, some of whom are infants, the record does not show either the service of process against the defendants, or an appearance by them, it is presumed that the lower court had no jurisdiction over them, and the judgment will be reversed, notwithstanding the appearance of an adult defendant, after verdict, to move for a particular judgment.

**SAME.**—*Infant.*—*Notice.*—*Guardian ad Litem.*—No guardian *ad litem* can be appointed by the court for an infant defendant who has not been personally served with process if a resident, or, if a non-resident, with notice by publication.

From the Madison Circuit Court.

*W. March, W. N. Pierse and H. D. Thompson*, for appellants.

*M. S. Robinson and J. W. Lovett*, for appellee.

Howk, C. J.—On the 5th day of June, 1874, the appellee filed, in the Madison Circuit Court, an amended complaint of two paragraphs, against one Ira K. Carver, as sole defendant. At the June term, 1874, of said court, the defendant filed his demurrer to said amended complaint, of which demurrer it is said by the clerk of said court, in brackets, that “this demurrer cannot be found.” The demurrer was overruled, and the defendant excepted. The defendant then answered in three paragraphs, the first two being separate general denials to the two paragraphs of the complaint, and the third paragraph of said answer setting up an affirmative defence to the action. To this third paragraph the appellee replied by a general denial.

The next entry in the record shows, that, at the March term, 1875, of said court, the defendant filed “his bill of exceptions, in this cause, properly signed by the judge of this court, in these words, to wit,” and then follows a copy of a bill of exceptions. This bill purports to contain certain proceedings of the court, in the cause, long prior to the filing of said amended complaint, in relation to a trial of the cause then had, and a general verdict and special finding of facts then found by a jury in said cause. This general verdict and these special findings are not in the record, nor are the pleadings in the cause, at the time of such trial, set out in the record.

At the June term, 1875, of said court, it was shown to the court, that, in vacation, the appellee had filed in said cause what is termed a supplemental complaint, suggesting the death of said Ira K. Carver, and naming the appellants, six in number, as his only heirs at law, three of whom, it was alleged, were minors under the age of twenty-one years, and that a summons had been issued thereon for said appellants. This summons is not in the record, and it does not appear that it was ever served on the appellants, or any of them. The court appointed a guardian *ad litem*



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for the infant defendants, and an answer was filed in their behalf; but we are informed, by a memorandum of the clerk of said court in brackets, that "this answer is off the files."

No answer was filed by the adult appellants, nor does the record clearly show any appearance by them or by any one on their behalf, nor were they ruled to answer, nor were they called and defaulted. The cause was tried by a jury, and a special verdict was returned. The defendant Esther J. Carver then appeared by counsel, and moved the court in writing for a particular judgment on the verdict, for the appellants; which motion was overruled, and to this ruling the defendants excepted. There was no motion for a new trial, and the evidence is not in the record. The court, of its own motion, rendered a decree and judgment on the special verdict, and the defendants appealed to this court.

Many errors are assigned by the appellants in this court, but the record is in such an imperfect condition, that we can not consider them. The judgment, however, can not be sustained, as the record fails to show that the court below had acquired jurisdiction of the persons of the appellants. The summons issued on the supplemental complaint, and the service thereof, if the same was ever served, were necessary parts of the record. In their absence, we are bound to assume that the circuit court had no jurisdiction of the appellants, and especially of the infant defendants. As against infant defendants, nothing can be presumed, and the record must show that they have been duly served with process. They can not appear by an attorney, and it must be shown to the court that a summons, duly issued, has been personally served upon them, or, if non-residents, publication made, before the court will be authorized to appoint a guardian *ad litem* in their behalf. *Abdil v. Abdil*, 26 Ind. 287; *Cochnowar v. Cochnowar*, 27 Ind. 253; *Hawkins v. Hawkins' Administrator*, 28 Ind. 66.

The judgment is reversed, at the appellee's cost, and the

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cause is remanded for process against the appellants, for default or answer, and for further proceedings.

Petition for a rehearing overruled.

64	197
197	180
64	197
138	305

MILLNER ET AL. V. EGLIN ET AL.

**INSTRUCTION TO JURY.**—*Comparative Weight of Oral Evidence and Depositions.*—*Case Overruled.*—On the trial of a cause wherein both oral evidence and depositions of witnesses had been introduced, the court instructed the jury, that, "In weighing the evidence of witnesses, you are to look on their means of knowledge, and at their honesty, in the light of all the corroborating and surrounding facts and circumstances in the case; and in this connection you have a right to look at the appearance of the witnesses upon the stand, and, because of this, *other things being equal* in regard to witnesses, the testimony of those examined in open court is entitled to greater weight than the testimony of witnesses embodied in depositions."

*Held.* that the instruction was erroneous. *Carver v. Louthain*, 38 Ind. 589, overruled in part.

From the Lake Circuit Court.

*T. J. Merrifield* and *W. Johnston*, for appellants.

*A. L. Jones*, *C. Baker*, *T. A. Hendricks*, *O. B. Hord* and *A. W. Hendricks*, for appellees.

**NIBLACK, J.**—This was an action by Alexander Millner and John Hardesty, against John Eglin, Frank P. Eglin and Mahala P. Eglin, to set aside a deed executed under a contract for the exchange of lands, on the alleged ground of fraud and misrepresentation.

The action was commenced in the Porter Circuit Court, but, by a change of venue, was transferred to the court below.

The complaint charged, amongst other things, that, on the 14th day of November, A. D. 1874, the plaintiffs were the

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owners of a certain forty-acre tract of land, lying in Porter county, of the value of sixteen hundred dollars; that said plaintiffs on that day entered into an agreement with the defendants John Eglin and Frank P. Eglin, whereby they, the plaintiffs, were to convey said forty-acre tract of land to the defendant Mahala C. Eglin, who was the wife of the said John Eglin and the mother of the said Frank P. Eglin, and the said John Eglin and Frank P. Eglin were, on their part, to convey to the plaintiff Millner a certain tract of land in Lincoln county, in the State of Kansas, and also to hold the possession and right of pre-emption under the homestead law of the United States, of a one-hundred-and-sixty-acre tract of land in said Lincoln county, Kansas, until the 15th day of June, A. D. 1875, and then to deliver such possession to the plaintiffs, together with a quantity of building material situate on said last mentioned tract of land, and to pay the plaintiffs the sum of two hundred dollars in money; that deeds were mutually executed and delivered according to said agreement; that the said John Eglin and Frank P. Eglin, at the time said agreement was entered into, and at the time when deeds were so mutually executed and delivered, made certain representations and statements to the plaintiffs as to the situation, character and quality of said Kansas lands, and as to the growing timber and improvements and building materials thereon, which representations and statements were believed and relied upon by the plaintiffs in making said contract for the exchange of lands, and in the execution and delivery of a deed to the forty-acre tract of land as above set forth, but which were false and fraudulent; that the said John Eglin and Frank P. Eglin did not hold the possession of the one-hundred-and-sixty-acre tract of land in Kansas until the 15th day of June, 1875, or sufficiently long to perfect their right of pre-emption thereto under the homestead laws of the United States, but abandoned the

same and their claim of pre-emption thereto, in consequence of which said land was taken possession of and pre-empted by other persons, and thus lost to the plaintiffs.

A tender of a deed from the plaintiffs, reconveying the Kansas lands, an offer to return the money received by the plaintiffs, and a demand for a reconveyance for the forty-acre tract of land in Porter county, were each, also, respectively averred.

The defendants answered in three paragraphs:

1. In general denial;
2. Setting up that the plaintiffs, in consideration of the sum of twenty dollars, had released the defendants from their obligation to hold and maintain the homestead claim on the one-hundred-and-sixty-acre tract of land in Kansas;
3. That the forty-acre tract in Porter county was conveyed to the said Mahala C. Eglin, subject to a mortgage for one hundred dollars, which the defendants agreed and assumed to pay; that, at the time said land was conveyed to the said Mahala, there was due as interest on said mortgage the sum of eight dollars; that before the commencement of this suit, and before the plaintiffs had demanded a reconveyance of such land, the defendants had paid the sum of nine dollars to prevent said mortgage from being foreclosed, of which the plaintiffs had full notice, and which sum of money the plaintiffs had not repaid or offered to repay to the defendants.

The plaintiffs interposed a demurrer to this third paragraph of the answer, but it was overruled.

After some further proceedings, which need not be here noticed, and issue joined, the jury trying the cause returned a verdict for the defendants, and, over a motion for a new trial, judgment was rendered in accordance with the verdict.

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Errors are assigned upon the overruling of the demurrer to the third paragraph of the answer, and upon the refusal of the court to grant a new trial.

No specific objection to the third paragraph of the answer has been pointed out to us by the appellants, and hence, by the well established practice of this court, we are not required to enter into the consideration of the question of its sufficiency.

The evidence upon the trial consisted of certain instruments in writing, of oral testimony, and of the depositions of witnesses. Depositions formed a considerable portion of the evidence introduced by the plaintiffs. Questions as to the weight of evidence, and as to the relative credibility of witnesses, arose upon the trial and went to the jury with the evidence in the cause. Concerning those questions the court instructed the jury as follows :

“In weighing the evidence of witnesses, you are to look on their means of knowledge, and at their honesty, in the light of all the corroborating and surrounding facts and circumstances in the case; and in this connection you have a right to look at the appearance of the witnesses upon the stand, and, because of this, other things being equal in regard to witnesses, the testimony of those examined in open court is entitled to greater weight than the testimony of witnesses embodied in depositions.”

It is insisted that this instruction is erroneous; that the rule for weighing evidence laid down by it is not recognized by the authorities, and has in reality no existence as a rule of law.

On the other hand, it is contended that the instruction is sustained by the case of *Carver v. Louthain*, 38 Ind. 530; that instruction numbered ninth, ruled upon in that case, was in principle and in substance a parallel one to the instruction before us. We are, however, of the opinion that the two instructions are not parallel in all

essential respects. We think the case of *Carver v. Louthain*, *supra*, taken altogether, does not go so far to the disparagement of testimony submitted through the medium of depositions, as does the instruction now under consideration. That case does not go to the extent of saying, that, "other things being equal in regard to witnesses," depositions are entitled to less weight than oral testimony, but went rather to the credibility of conflicting witnesses, where the opportunities for applying the usual tests had not been "equal" between the two classes of witnesses referred to.

We know as a matter of fact, from common observation, that, in many cases, perhaps in most cases, the testimony of a witness orally given is much more likely to make a decided impression upon a jury than if communicated in the form of a deposition. We also know, in the same way, that, in other cases, the depositions of witnesses would be more likely to make a favorable impression on the jury than if such witnesses had testified orally before the jury, depending in every case upon the intelligence, the peculiarities, the general appearance and all other circumstances attending each particular witness. These are matters about which the law lays down no general or inexorable rule. They constitute facts for the consideration of the jury in every case in which such questions may arise. We know of no rule of law by which the instruction complained of, as above, can be sustained. *Nelson v. Vorce*, 55 Ind. 455; *Pratt v. The State*, 56 Ind. 179.

Upon a review of the case of *Carver v. Louthain*, above referred to, we have come to the conclusion, that so much of it as holds that the ninth instruction, copied into the opinion, was correctly given to the jury in that case, must be considered as overruled, so far as it may be construed as inconsistent with this opinion. So much of that case as approves the eleventh instruction, commented upon

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Mullen v. Beech Grove Driving Park.

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by it, has already, by implication, been overruled. *Greer v. The State*, 53 Ind. 420; *Veatch v. The State*, 56 Ind. 584.

As what we have said disposes of the case at the present hearing, we will not now consider some other questions discussed by counsel.

The judgment is reversed, with costs, and the cause remanded for a new trial.

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MULLEN v. BEECH GROVE DRIVING PARK.

**SUBSCRIPTION.—Indemnity.—Premium for Horse-Racing.—Complaint.—Capacity to Sue.—Parties.**—In an action against a subscriber, upon a written subscription of sums of money by the defendant and others severally, to a certain association, "for the purpose of assisting in the payment of premiums offered by the directors of" the association "for trotting, pacing and running races to be given" on the plaintiff's track, at a certain time and place, payable to the secretary thereof only in case "there should be a loss to said" association "on account of said races," the complaint alleged that the plaintiff was an association organized under the laws of this State, "for the purpose of purchasing grounds for a driving park \* for the improvement of horses in speed, style, action and blood," etc., and that there had been a loss to the plaintiff, on account of such races, of a sum exceeding the aggregate subscribed.

**Held**, on demurrer, that the complaint is sufficient, that the plaintiff had capacity to sue, and that the action can be maintained, not by the secretary, but only by the plaintiff.

**SAME.—Voluntary Association.**—Such an association may properly be organized under section 2 of the act authorizing voluntary associations, 1 R. S. 1876, p. 923.

**SAME.—Consideration.—Corporate Existence.—Estoppel.**—Such subscription was based upon a sufficient consideration, and estopped the defendant from denying the corporate existence of the plaintiff.

**SAME.—Recording Articles of Association.—Answer.**—By his subscription the defendant admitted that the plaintiff's articles of association had been duly recorded, and is estopped from denying such fact by answer.

**SAME.—Ultra Vires.—Gaming.—Pool-Selling.**—An answer admitting the sub-

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scription sued upon, but alleging that the plaintiff was organized for an unlawful purpose, viz., the purchase of grounds for horse-racing "and other purposes," or to enable the plaintiff to sell "pools" upon horse-races, is insufficient.

*SAME.—Fraud.—Negligence.*—An answer admitting the execution of the subscription sued upon, but alleging that the person procuring his signature had misrepresented the contents of the subscription and the extent of liability the defendant would incur by signing it, is insufficient.

From the Jefferson Circuit Court.

*J. Roberts and H. Francisco*, for appellant.

*C. E. Walker and W. S. Roberts*, for appellee.

PERKINS, J.—Suit by Beech Grove Driving Park, against Thomas S. Mullen, upon the following written instrument:

"We, the undersigned, agree to pay the sums set opposite our names to W. P. Graham, Secretary of Beech Grove Driving Park, for the purpose of assisting in the payment of premiums offered by the directors of said Driving Park for the trotting, pacing and running races to be given on the track of said Driving Park, commencing May 30th, 1876, and continuing four days; but it is hereby expressly agreed and understood, that the within amount, or any part thereof, shall not be due or paid, or be binding upon the subscribers, unless there should be a loss to said Driving Park on account of said races; and then, and in that case, said loss shall be made up by the payment of so much per centum of the subscriptions hereto as may be necessary to make said loss, and no more; and it is hereby understood, that in no event shall the subscribers hereto, or any of them individually, be liable for more than the amount hereto subscribed, and we hereby expressly and individually agree to pay said per centum.

NAMES.	AMOUNTS.
JOHN KRAUT.....	\$50
THOMAS S. MULLEN.....	50."

The complaint avers, that "plaintiff is a corporation, organized under and pursuant to the laws of the State of Indiana, for the purpose of purchasing suitable grounds



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for a driving park, for the promotion of agricultural purposes, and for the improvement of horses in speed, style, action and blood, and for the healthful recreation of its members." It avers furthermore, that said subscription was made to the plaintiff, as such corporation, by the name and description of W. P. Graham, Secretary; that, in consideration of the subscriptions made, of which that of the defendant was one, the plaintiff offered premiums in the amount of six thousand dollars; that the expenses were twenty-five hundred dollars, the aggregate of which sums "exceeded the amount received by plaintiff from all sources whatever, on account of said exhibition, \$2,000; that the amount subscribed to said guaranty fund was \$1,300; wherefore plaintiff says said sum subscribed is due plaintiff; that defendant refuses to pay the same, although often requested," etc.

The corporation claims to exist under section 2 of the Voluntary Association act, 1 R. S. 1876, p. 923.

Demurrer to the complaint assigning for causes:—

1. Want of facts;
2. Want of legal capacity in the plaintiff to sue; and,
3. That the suit should have been brought in the name of Graham.

The demurrer was overruled, and exception entered.

Answer in six paragraphs:

1. *Nul tiel corporation*, without verification.
2. That the articles of association were not filed in the recorder's office of Jefferson county, Indiana.
3. That the plaintiff is not a corporation for the purpose of promoting agriculture, etc., "but that said Beech Grove Driving Park is an organization for the purpose, as averred in their pretended articles of association, of purchasing real estate in general and for other purposes; wherefore defendant says there is no such corporation," etc.

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4. That said subscription was obtained by fraud, in this, that the agent who procured it assured the defendant that he could not be called on to pay more than ten dollars of the amount; that he wanted him to subscribe as an inducement to others to do so, and upon these representations he subscribed without reading the paper.

5. That the plaintiff is a fraud, gotten up in evasion of the statute for the formation of voluntary associations, and is really for gaming purposes connected with horse-racing, "so that plaintiff might be enabled thereby, for gain, to sell pools upon the result of said races, in and of itself an illegal act, and might be enabled thereby, through said races, to sell for gain, to any person wanting the same, the privilege of selling pools on the results of said races," etc. And,

6. The general denial.

Demurrer to the first, second, third, fourth and fifth paragraphs of answer sustained.

Trial by the court, finding for the plaintiff, motion for a new trial overruled, and judgment on the finding.

The reasons assigned therefor, in the motion for a new trial, were:

1. Because the finding of the court is not sustained by the evidence, and is contrary to the evidence and the law; and,

2. Because the court erred in permitting plaintiff to introduce in evidence, over the objection of defendant, the contract filed with complaint, described therein and made a part thereof.

The assignment of errors is as follows:

"1. In overruling the demurrer to the complaint;

"2. In sustaining the demurrer to the second paragraph of answer;

"3. In sustaining the demurrer to the third paragraph;

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"4. In sustaining the demurrer to the fourth paragraph;

"5. In sustaining the demurrer to the fifth paragraph; and,

"6. In overruling the motion for a new trial."

We proceed to consider the alleged errors.

There was no error in overruling the demurrer to the complaint.

The contract sued on was upon a sufficient consideration. *Alvord v. Smith*, 63 Ind. 58.

It admitted the existence of the corporation, and estopped the appellant to deny that existence, if the law authorized such a corporation to exist. *The Indianapolis, etc., Co. v. Herkimer*, 46 Ind. 142.

And if the corporation existed, it had the capacity to sue. We think such a corporation might exist under the 2d section of the act concerning voluntary associations, 1 R. S. 1876, p. 923.

The suit was properly brought in the name of the corporation. It is plain that the subscription was for the use and benefit of the corporation; that it was the real party in interest.

It is not assigned for error that the court sustained the demurrer to the first paragraph of answer, viz., that of *nul tiel corporation*. This ruling is thus admitted to have been correct.

The court did not err in sustaining the demurrer to the second paragraph of the answer. The 4th section of the act above cited provides, that "Every such association shall, from the time such record is filed in the proper recorder's office, be deemed and held to be a corporation," etc.

As the association became a corporation only upon the filing and recording of its articles of association, in the proper recorder's office, and the defendant (appellant)

by the contract recognized the existence of the corporation, it admitted that its articles of association had been filed in the proper recorder's office.

The third paragraph of answer was bad. The corporation had a right, as one of its purposes, to purchase real estate for its race-ground. It is not averred, that it purchased more than this; and the "other purposes," for which the paragraph admits it was organized, are not denied to be legal, and within the statute. This paragraph was clearly bad.

The fourth paragraph is so manifestly bad that we need not spend time in commenting upon it. It admits the signing by the appellant of the contract with full opportunity to read it before signing, but that he voluntarily declined to do so, for the reason that the person presenting it to him said, that the corporation did not expect to call upon him for more than ten dollars of his subscription; that is, they expected, they entertained the hope, the opinion, that the receipts of the exhibition would be so large, that his proportion of the deficiency would not be over ten dollars. This shows no legal fraud. *Fox v. The Allensville, etc., Turnpike Co.*, 46 Ind. 31; *Birch v. Bradford*, 17 Ind. 490.

The fifth paragraph is shown to be insufficient by the case of *Alvord v. Smith, supra*.

In delivering the opinion of the court in that case, Judge BIDDLE said:

"Nor do we think the facts alleged in the complaint show a wager or bet. There is a clear distinction between a wager or a bet, and a premium or reward. In a wager or a bet, there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished, who are the parties who must either lose or win. In a premium or reward, there is but one party until the act, or thing, or purpose, for which it is of-

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ferred, has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. \* \* \*

"Nor can we see anything unlawful, or against public policy, in the facts alleged in the complaint. Under our statutes, 1 R. S. 1876, p. 48, encouraging agriculture, and authorizing public fairs, premiums are offered for the best draft horse, saddle horse, trotting horse, the best stock for this or that purpose. These premiums are certainly not wagers. As well might we call an insurance policy a wager because it is to be paid on an uncertain event, as to call a premium a wager because we do not know who will be entitled to it until the event happens. We see no difference, indeed, in principle, between a premium offered by an authorized corporation, and one offered by a private partnership. Neither are wagers, nor are they unlawful."

In the light of the decision in the case of *Alvord v. Smith, supra*, we may safely hold, that corporations organized to purchase ground for the purpose of being fitted up to be used for what we may call fairs or horse-shows, for the exhibition of horses, and showing their speed and bottom in races, and paying premiums upon them, are within the statute authorizing voluntary associations, for the encouragement of agriculture, etc., and that that in question in this case is legal and valid.

Good stock is an efficient instrumentality in prosperous husbandry. This being so, any tendency to foster other abuses and evils is unimportant, as affecting the right of recovery in this case.

The exhibition in question was one of those within the purposes and powers of the corporation, and the contract made in aid of it was legal and binding.

The judgment is affirmed, with costs.

## BATE v. SHEETS.

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**DITCHES AND DRAINS.—Act of 1867.—Action to Collect Assessment.—Record.**

—*Evidence.*—In an action to recover an assessment made under the drainage act of March 11th, 1867, 2 R. S. 1876, p. 684, the record of the petition, upon being properly identified and on proof of the loss of the petition, is competent evidence.

**SAME.—Act of 1875.—Repeal of Statute.**—The drainage act of March 9th, 1875, 1 R. S. 1876, p. 428, repeals the act of March 11th, 1867, only so far as their provisions conflict.

**SAME.—Evidence.**—*Section 4 of Act of 1875.*—By section 4 of the act of 1875, it is necessary to establish, even in an action to recover an assessment made under the act of 1867, that the evidence adduced before the board of commissioners showed, and that the board found, the proposed drain to be necessary and conducive to the public health, convenience or welfare, or of public benefit or utility; otherwise the defendant is entitled to recover.

**SAME.—Section 9 of Act of 1867.—Personal Judgment.—Lien.**—Section 9 of the act of 1867 was not re-enacted or changed by the act of 1875, and under it the plaintiff in such action is entitled to recover, if at all, a personal judgment against the defendant, if a resident, as well as a lien against the land.

**SAME.—Effect of Act of 1875 on Proceeding Pending Under Act of 1867.**—A proceeding for the construction of a drain, under the act of 1867, which was *in fieri* on the taking effect of the act of 1875, must thereafter have conformed to the requirements of the latter act, where they conflict with those of the previous act.

**SAME.—Contract.—Remedy.—Vested Right.**—An assessment under the act of 1867 was not a contract, but a remedy, in which there was no vested right.

From the Clinton Circuit Court.

*J. N. Sims*, for appellant.

*H. Y. Morrison, T. H. Palmer, J. W. Morrison and J. U. Gorman*, for appellee.

**BIDDLE, J.**—These proceedings were commenced by the appellee, under the act of March 11th, 1867, 2 R. S. 1876, p. 684, to construct a drain through the lands of the appellant.

Under this act, the case has already been once appealed.

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*Bate v. Sheets.*

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and decided by this court. *Bate v. Sheets*, 50 Ind. 329. It was brought to recover the amount of an assessment against the lands of the appellant.

Since the commencement of the proceedings, the whole subject has been re-enacted by the act of March 9th, 1875, 1 R. S. 1876, p. 428, which, by its terms, is "not to be so construed as to repeal any law of this State now in force to encourage the construction of levees, dikes and drains, and to enable the owners of wet lands to drain and reclaim the same, but such shall be in addition thereto."

Wherein the acts conflict, the latter of course must prevail, as being the last legislative expression upon the subject.

The case, as already reported, sufficiently states the proceedings. The judgment was reversed upon the insufficiency of the evidence, and remanded for a new trial, upon which the appellee again recovered against the appellant, who appeals the second time.

The principal questions now before us arise under the motion for a new trial, the causes assigned for which are :

1. That the decision of the court is not sustained by sufficient evidence ;
2. Is contrary to law ; and,
3. That the court improperly admitted evidence over the objections of the appellant.

The assignments of error here are, that the court erred in overruling the motion for a new trial, and in rendering a personal judgment against the appellant in favor of the appellee.

We will consider the questions presented, in the following order :

1. At the trial, after proving the loss of the original application, in writing, of the appellant, to construct the ditch, and proving the record book of the board of commission-

ers, the appellee offered to read, from the record containing it, a copy of the original application, in evidence. To this evidence the appellant objected, "upon the ground that the same was not authenticated by the certificate of the auditor and seal of the commissioners' court; that the same was not officially authenticated by the parol testimony of the witnesses; and that the same and every part thereof was incompetent evidence under the issues in the case." The court overruled the objection and the appellant excepted. There is no error in this ruling. It is impossible for the transcript of a record to be higher evidence than the record itself. The identity of the book of records was properly proved by parol; indeed, we know of no other way by which it could be proved; and we think the evidence was competent under the issue.

2. As to the sufficiency of the evidence to sustain the decision of the court: We have read it carefully. It is necessary, by section 4 of the later act, above cited, that the evidence should prove, and the board of commissioners should find, that such proposed work is necessary and conducive to public health, convenience or welfare, or of public benefit or utility, before they can establish the same as specified by the report of the reviewers. *McKinsey v. Bowman*, 58 Ind. 88. We can not find any such evidence or such finding in the record. The evidence, therefore, is insufficient to sustain the decision of the court.

3. Did the court err in rendering a personal judgment in favor of the appellee and against the appellant?

The appellant contends that the judgment could only be *in rem*, against the land. Section 9 of the act of 1867, cited, is as follows:

"SEC. 9. When said work is completed according to specifications in the application, it shall be lawful for said applicant to demand of, and receive from the owners of said lands, or any one of them, the amount of benefits so



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assessed against his said lands, and if the same shall not be paid within ten days after the demand, said applicant is hereby authorized to sue and collect the same in any court having jurisdiction to enforce liens on real estate: *Provided*, That if the owner of the land is a non-resident of the county, or if he is unknown to the applicant, no demand shall be necessary."

The subject-matter of this section is not re-enacted, or in any manner changed, by the act of 1875; it is therefore still in force.

We think this section contemplates a personal judgment, as well as a lien upon the land, which may be enforced against it *in rem*. Against a non-resident, or person unknown, upon whom no service or process has been had, and who has not appeared to the action, of course no personal judgment could be rendered. In such cases, it would be necessary to proceed *in rem*, against the land. We think the act authorizes the collection of assessments in both methods, or by either.

It follows, that the court did not err in the form of the judgment, if the evidence had supported the decision.

For the insufficiency of the evidence, the judgment is reversed, at the costs of the appellee.

#### PETITION FOR A REHEARING.

BIDDLE, J.—The appellee seems to think, that, because these proceedings were commenced under the act of March 11th, 1867, and the assessment of benefits made against the appellant before the act of March 9th, 1875, took effect, therefore he has a vested right to collect the assessment under the former act. We are of a different opinion.

There is no vested right in a remedy. The assessment is not a contract made by the agreement of the appellant. It is a right given to the appellee by statute, which, being against common right, must be construed strictly, and the

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facts must prove his right according to the statute in force at the time he seeks his remedy, or he can not recover.

The trial was had in this case, in June, 1876, nearly one year after the act of March 9th, 1875, went into force, and it is very clear, that the facts proved at the trial do not authorize a recovery under the latter act, because they do not show that the drain is necessary and conducive to public health, convenience or welfare, or of public benefit or utility.

It was necessary that all proceedings commenced under the act of March 11th, 1867, and being *in fieri* at the time the act of March 9th, 1875, went into effect, should subsequently conform to the latter act in all respects wherein the two acts differed. This not being the case in the proceeding before us, the appellee was not entitled to recover. *Stephenson v. Doe*, 8 Blackf. 508; *Roush v. Morrison*, 47 Ind. 414; *The Board of Comm'rs, etc., v. Ruckman*, 57 Ind. 96; *McKinsey v. Bowman*, 58 Ind. 88.

The petition for a rehearing is overruled.

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MORGAN v. THE INCORPORATED COMPANY OF GAAR, SCOTT & CO.

**WARRANTY.**—*Breach of, as a Defence.*—*Presumed to be Parol, if not Alleged to be Written.*—*Evidence.*—Where a breach of an alleged warranty of a chattel is relied upon as a defence to an action for the contract price, it is presumed, where such warranty is not alleged by the answer to be in writing, that it was merely verbal; and, in such case, a written or printed instrument, claimed to be the warranty, is not admissible as evidence to sustain the warranty alleged.

**SAME.**—*Price-List.*—*Correspondence.*—A printed price-list issued by the plaintiff, and also correspondence between him and the defendant, fall within the above rule.

From the Daviess Circuit Court.

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Morgan v. The Incorporated Company of Gaar, Scott & Co.

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*J. Baker*, for appellant.

*W. R. Gardiner* and *S. H. Taylor*, for appellee.

WORDEN, J.—Action by the appellee, against the appellant, upon two promissory notes executed by the defendant to the plaintiff, each for the sum of six hundred and fifteen dollars, the one payable July 1st, 1876, and the other January 1st, 1877.

Issue; trial by jury; verdict and judgment for the plaintiff, a new trial being refused.

The defendant answered, among other things, in substance, that the note sued upon, without specifying which one, was given for the purchase-money for a certain engine, boiler, saw-mill and machinery sold by the plaintiff to the defendant, at a price greatly beyond the amount of the note, to wit, the sum of two thousand dollars, of which he paid, before the commencement of the action, a large sum, to wit, one thousand six hundred and seventy-five dollars, leaving a balance of the purchase-money of four hundred and forty dollars unpaid, as to which sum the consideration of the note had failed, in this, that the plaintiff made certain false representations as to the quality and capacity of the engine, etc., which are set out, and the representations negatived; also that the plaintiff warranted that the engine, etc., were of sufficient power and capacity to saw from three to five thousand feet of lumber per day, and a breach of the warranty is alleged. Issue was taken on this paragraph of answer.

The reasons which are here urged for a new trial are thus set forth in the motion therefor filed below:

“1. The court erred in excluding the price-list of mills of plaintiff, which defendant offered to read to the jury;

“2. The court erred in sustaining the objection of the plaintiff to the introduction of that portion of said price-list designated as number 4;

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*Morgan v. The Incorporated Company of Gaar, Scott & Co.*

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"3. The court erred in sustaining the objection to the evidence of John Sullivan, as offered and proposed by the defendant; and,

"4. The court erred in excluding from the evidence the letter written by plaintiff to defendant, of the date of May 13th, 1875."

We proceed to consider these reasons:

The first and second may be considered together, as they both depend upon the same question.

It appeared that the plaintiff was a manufacturer of mills, etc., and that it sent out to the public its circulars, being what are called in the evidence "price-lists" of its manufactures. These price-lists contained descriptions and prices of different kinds of mills, and, among others, the following:

"Gaar, Scott & Co.'s No. 4 mill."

A description of this mill is set forth, and the description concludes as follows:

"Will cut 3,000 to 5,000 feet per day. Price, on cars, \$1,845."

The defendant received from the plaintiff, through the post, one of these price-lists, and ordered from the plaintiff one of the No. 4 mills. At the proper time, he offered in evidence the price-list above mentioned, or so much of it as pertained to No. 4 mills, but the evidence was rejected. We have no brief from the appellee, and are not advised upon what ground the evidence was rejected.

It is claimed by the appellant that the evidence should have been received as tending to prove the alleged warranty of the capacity of the mill to saw the quantity of lumber per day mentioned. If the statement in the price-list, that the mill would cut the amount of lumber specified, is to be taken as a warranty, it is because it enters into and forms part of the contract of sale of the mill. It is a written instrument (or printed, which is the same thing,) which was the foundation of the defence.

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It should have been, but was not, referred to in the answer, and the original or a copy thereof should have been filed. The answer made no mention of the writing, and the presumption arose that the warranty alleged was a mere parol warranty. *Harper v. Miller*, 27 Ind. 277; *King v. The Enterprise Ins. Co.*, 45 Ind. 43. The defendant could not, therefore, support his answer by the written instrument. He had alleged a parol warranty, and could not prove a written one. We think there was no error in rejecting the evidence.

The evidence offered, of John Sullivan, went merely to identify the price-list, or show that the purchase was made under it, and no harm resulted to the defendant in rejecting it. The price-list being rejected, the facts sought to be proved by Sullivan were of no importance whatever.

The letter from the plaintiff to the defendant, of the date of May 13th, 1875, seems to have pertained to a different matter.

It acknowledged the reception of a note of one hundred and twenty-five dollars, for "top rigging," and added:

"We will warrant everything all right and perfect that we send out."

If this were to be regarded as a warranty extending to the mill, still it is a written one not set up in the answer. It was therefore properly rejected.

There is no error in the record.

The judgment below is affirmed, with costs.

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REED ET AL. v. WORLAND, EXECUTOR.

REVIEW OF JUDGMENT.—*Complaint.*—*Incompetent Witness.*—*Bill of Exceptions.*—*Common Pleas Judge.*—In an action to review a judgment rendered

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by a certain common pleas court, for error of law in permitting the opposite party to testify as a witness on the trial of the cause, the record set out in the complaint for review embodied a bill of exceptions containing the evidence of such witness, signed by the judge of such court after the taking effect of the act of March 6th, 1878, 1 R. S. 1876, p. 380, dividing the State into circuits and abolishing the court of common pleas.

*Held*, on demurrer, that such judge had no authority to sign the bill of exceptions, that it should have been signed by the judge of the proper circuit court, and that the complaint is insufficient.

From the Shelby Circuit Court.

*J. B. McFadden* and *J. W. Tomlinson*, for appellants.

*A. Blair*, for appellee.

Howk, C. J.—This was a suit by the appellee, against the appellants, for a review of the proceedings and judgment of the court of common pleas of Shelby county, in favor of the appellants and against the appellee, for an alleged error of law appearing in said proceedings and judgment.

In his complaint, the appellee alleged, in substance, that, in a suit before a justice of the peace of Shelby county, the appellants recovered judgment against one Amos E. Gregg for the sum of eighty dollars, from which judgment the said Gregg appealed to said court of common pleas; that, pending said appeal, the said Gregg died testate, and the appellee was duly appointed and qualified as executor of said decedent's last will, and as such executor was substituted as the defendant in said suit, in the place of said Gregg; that, on the — day of March, 1878, the said suit came on for trial, and the said court of common pleas then and there found for the appellants, and rendered judgment in their favor for the sum of ninety dollars and four cents, a copy of which judgment was made part of the appellee's complaint; that certain evidence was given by certain witnesses, on the trial of said cause, which evidence was to be here inserted; that the court of common pleas committed an error of law in permitting the appellants to testify, as a matter of right, to the merits of said cause, over the appellee's objections, which evidence and the rulings of said

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court were made part of the record of said cause, and duly signed by the Hon. Richard L. Coffey, the judge of said court, who tried said cause. Wherefore the appellee prayed that the said judgment might be reviewed, reversed and set aside, and for other proper relief.

The appellants' demurrer to this complaint, for the want of sufficient facts therein to constitute a cause of action, was overruled by the court, and their exception entered to this decision.

The appellants then answered, in substance, that they admitted that they obtained the judgment against the appellee, as in his complaint stated, but they denied every other material allegation in said complaint.

The appellee's motion to strike out the appellants' answer was sustained by the court, and to this decision the appellants excepted and filed their bill of exceptions.

Judgment was then rendered by the court below, in favor of the appellee and against the appellants, reversing, vacating and setting aside the aforesaid judgment of said court of common pleas, and ordering that the cause in which said judgment was rendered should be docketed for trial in the court below.

In this court, the appellants have assigned, as errors, the following decisions of the circuit court :

1. The appellee's complaint for review, in this case, did not state facts sufficient to constitute a cause of action ;

2. The court erred in overruling the appellants' demurrer to appellee's complaint for review ; and,

3. The court erred in sustaining the appellee's motion to strike out the appellants' answer, and in rendering judgment in appellee's favor, upon the demurrer to his complaint.

In a complaint for review, the law is well settled, that it must bring before the court a full and complete record of the proceedings and judgment in the case sought to be re-

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viewed, including all the pleadings and proceedings in the cause. *Weathers v. Doerr*, 53 Ind. 104; *Hardy v. Chipman*, 54 Ind. 591; and *Goar v. Cravens*, 57 Ind. 365. In section 587 of the practice act, it is provided, that "The complaint" for review "may be filed for any error of law appearing in the proceedings and judgment." 2 R. S. 1876, p. 249.

In this case, the appellee alleged in his complaint for review, that the court of common pleas of Shelby county committed an error of law, in the case sought to be reviewed, in permitting the appellants to testify, as a matter of right, to the merits of said cause, over the appellee's objections.

Whether or not this alleged error was an error of law appearing in the proceedings and judgment of the court of common pleas depends, for its proper answer, upon the answer which must be given to another question, and that is, whether or not the evidence and the rulings of said court of common pleas, on the trial in said court, were made a part of the record of said cause by a proper bill of exceptions.

The record of this cause shows that the paper writing purporting to be a bill of exceptions containing the evidence and the rulings of the court of common pleas, on the trial of the case sought to be reviewed, was signed on the 9th day of May, 1873, by the Hon. Richard L. Coffey, who was the judge of said court of common pleas at the time of the trial of said case. The office of common pleas judge was abolished by section 79 of "An act to divide the State into circuits for judicial purposes," etc., approved March 6th, 1873; and of course, on that day, Judge Coffey ceased to be judge of the court of common pleas of Shelby county. 1 R. S. 1876, p. 390.

It is very clear, we think, that Judge Coffey, having ceased to be judge of the court of common pleas on the



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Hazzard *et al.* v. Duke.

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6th day of March, 1873, had no power or authority, on the 9th day of May, 1873, to sign a bill of exceptions in the case sought to be reviewed. The bill of exceptions should have been signed by the judge of the Shelby Circuit Court, to which court the business of said court of common pleas had been transferred by section 80 of the act last referred to. *Ketcham v. Hill*, 42 Ind. 64, and *McKeen v. Boord*, 60 Ind. 280.

The paper writing purporting to be a bill of exceptions, and signed by Judge Coffey on the 9th day of May, 1873, was not signed by the proper judge of the proper court, and therefore it did not become a part of the record of the case sought to be reviewed in the case now before us.

We are clearly of the opinion, that the alleged error of law, stated by the appellee in his complaint for review, was not an error of law appearing in the proceedings and judgment of the court of common pleas in the original suit. It follows, therefore, that the appellee's complaint for review in this case did not state facts sufficient to constitute a cause of action; and for this reason we hold, that the court erred in overruling the appellants' demurrer to said complaint.

This conclusion renders it unnecessary for us to consider the last alleged error.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

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137	447

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HAZZARD ET AL. v. DUKE.

**PROMISSORY NOTE** — *Parol Evidence that Endorsement was intended as Collateral.* — Parol evidence is competent to establish the fact that an endorsement of a promissory note was intended to transfer the note simply as collateral security and not absolutely.

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**SAME.—Sale of Collateral.—Measure of Damages.**—An endorsee of a promissory note held as collateral to secure advances, who sells and transfers the same to another, is liable to the endorser for the value thereof at the time of sale; which value is, *prima facie*, the amount of the note when transferred, including interest.

**SAME.—Compensation for Collecting.—Instruction.**—Such collateral endorsee can not complain of an instruction to the jury trying an action against him by the endorser, which directs them to charge him with interest on the balance due the plaintiff, after deducting advances by the defendant, interest thereon and compensation for collecting such note.

**SAME.—Interest.**—Interest is allowable on money wrongfully or unreasonably withheld.

From the Henry Circuit Court.

*M. E. Forkner and E. H. Bundy*, for appellants.

*J. Brown and J. M. Brown*, for appellee.

**BIDDLE, J.**—The appellee in his complaint avers, that the appellants were bankers under the firm name, "Hazzard, Murphey & Co.;" that he delivered to them three promissory notes, executed by Hiram Allen to him, secured by mortgage on real estate, as security for a loan, and for further advances; that they made certain other loans to him, then refused to make further advances, and collected the amount of the notes so delivered as collateral security, and refused to pay the appellee any part thereof. Wherefore, etc.

There was also a paragraph of complaint on the common count for money had and received.

Answer, trial by jury, verdict for appellee, judgment, appeal.

Four questions are presented by the record below, and by the assignments of error here:

1. The insufficiency of the complaint for the want of alleged facts.

No objection to the complaint is pointed out, and we can find none; indeed, this point is essentially waived by the appellants in their brief.

2. The appellee was permitted to testify at the trial, without objection, that the notes and mortgages were de-

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livered by him to the appellants as collateral security, and not absolutely. Afterwards the appellants moved to strike this testimony out of the record, upon the ground that the assignment of the notes was in writing, which could not be thus contradicted by parol evidence; but the court overruled the motion.

It was competent to show by parol evidence that the assignment was collateral. The authorities sustain the court in this ruling: *Conwell v. Evill*, 4 Blackf. 67; *Blair v. Bass*, 4 Blackf. 539; *Heaston v. Squires*, 9 Ind. 27; *The Evansville, Indianapolis and Cleveland Straight Line R. R. Co. v. Shearer*, 10 Ind. 244; *The Chicago, Cincinnati and Louisville R. R. Co. v. West*, 37 Ind. 211; *Mace v. Jackson*, 38 Ind. 162; *Stanley v. Sutherland*, 54 Ind. 339.

3. The court instructed the jury as follows:

"If you find from the evidence, that the notes were delivered to the defendants as security for money loaned to plaintiff by the defendants, and were to be collected by the defendants, when they became due, and the proceeds to be applied to the payment of such loans, in trust thereon, and a reasonable compensation for the collection of the same, and you further find that the defendants sold and assigned the notes to other parties without the consent of the plaintiff, then the defendants would be bound to account to said plaintiff for the amount of such notes so sold, and interest thereon, which had accrued at the time of such sale, the same as if they had collected the same."

The appellants have nothing to complain of in this instruction. The rule of damages was, doubtless, the value of the notes thus assigned, at the time they were sold by the appellants; but that value would be, *prima facie*, the amount of the notes and interest; and, as there was no evidence in the case tending to show that the notes were of any less value, the instruction was right. *Mettler v. Moore*, 1 Blackf. 342; *Hayworth v. Worthington*, 5 Blackf.

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361; *Parks v. Marshall*, 10 Ind. 20; *Tea v. Gates*, 10 Ind. 164; *Pribble v. Kent*, 10 Ind. 325; *Pierce v. Spader*, 13 Ind. 458; *Yater v. Mullen*, 24 Ind. 277; *Ellis v. Wire*, 33 Ind. 127.

4. The court also instructed the jury as follows :

"If you find that there is a balance due the plaintiff, then he is entitled to recover interest thereon from the time said balance was collected by the defendants, and after the payment of all advances to plaintiff, interest thereon, and compensation for collecting said notes."

If there is any error in this instruction, it is not against the appellants. It is clear that the appellee—it being a money transaction—was entitled to interest on all money detained from him; but it is not so clear that the appellants were entitled to deduct the expenses of collecting notes which they had wrongfully sold as their own property, and converted the proceeds to their own use.

Interest is allowable on money wrongfully or unreasonably withheld. *Rogers v. West*, 9 Ind. 400; *Kellenberger v. Foresman*, 13 Ind. 475; *The City of Jeffersonville v. Patterson*, 26 Ind. 15; *Miller v. Billingsly*, 41 Ind. 489; *Killian v. Eigenmann*, 57 Ind. 480.

The judgment is affirmed, at the costs of the appellants, with ten per cent. damages.

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GREGG v. THE STATE.

**CRIMINAL LAW.—Larceny.—Indictment.**—An indictment for larceny must, to be sufficient, charge the defendant with having feloniously taken, stolen and carried away the property the larceny of which is alleged.

From the Elkhart Circuit Court.

*J. M. Vanfleet* and *E. C. Bickel*, for appeilant.

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*T. W. Woollen*, Attorney General, for the State.

Howk, C. J.—The appellant was indicted upon a charge of grand larceny.

At the September term, 1878, of the court below, the appellant was arraigned on the indictment, and, for plea thereto, said that he was not guilty as therein charged.

The cause was tried by a jury, and a verdict was returned, finding the appellant guilty of petit larceny, as charged in the indictment, and assessing his punishment at imprisonment in the state-prison for the period of one year.

The appellant's motion in arrest of judgment was overruled by the court, and his exception was entered to this decision, and judgment was rendered on the verdict.

The only error assigned by the appellant, in this court, is the decision of the court below, in overruling his motion in arrest of judgment.

In section 144 of the criminal code of this State, it is provided, that a motion in arrest of judgment "may be granted by the court for either of the following causes:

"*First.* That the grand jury who found the indictment had no legal authority to enquire into the offence charged, by reason of it not being within the jurisdiction of the court.

"*Second.* That the facts stated do not constitute a public offence." 2 R. S. 1876, p. 409.

The appellant's counsel, in their brief of this cause, do not call in question the legal authority of the grand jury to enquire into the offence charged in the indictment against the appellant, but they insist that the facts stated in the indictment do not constitute a public offence.

The indictment was as follows:

"The grand jurors for the county of Elkhart and State of Indiana, upon their oath do charge and present, that John Gregg, on the 20th day of August, A. D. 1878, at said county, one bank-bill of the current paper money of

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the United States, of the denomination of ten dollars, of the value of ten dollars; one bank-bill of the current paper money of the United States, of the denomination of two dollars, of the value of two dollars; three bank-bills of the current paper money of the United States, of the denomination of one dollar each, of the value of three dollars; two pieces of silver coin, of American coinage commonly called 'trade dollar,' of the value of one dollar each; and sundry pieces of silver coin, of American coinage, the denomination of which is to the grand jurors unknown, of the value of three dollars; all of the total value of twenty dollars, of the personal goods and chattels of Hugh McLaughlin and Angelo Emery."

It will be readily seen that this indictment is fatally defective, in this, that it fails to charge that the appellant performed any criminal act in connection with the money described therein. It does not appear from the indictment, that the appellant did feloniously steal, take and carry away the money described therein, as, it may be supposed, it was the intention of the grand jurors to charge and present in the indictment. We can not tell from the indictment whether the appellant stole the money, or simply borrowed it for temporary purposes, or, in fact, that he ever saw or had possession of the money. Doubtless the omission of the criminal charge was the result of mistake or oversight, but it is none the less fatal to the indictment. The facts stated in the indictment, as it is presented to us, do not constitute a public offence.

In our opinion, the court erred in overruling the appellant's motion in arrest of judgment.

The judgment is reversed, and the cause remanded with instructions to sustain the appellant's motion in arrest of judgment; and the clerk of this court will issue the proper notice for the return of the appellant to the sheriff of Elkhart county.

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The State v. Walters.

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THE STATE v. WALTERS.

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149	459

**CRIMINAL LAW.**—*Injuring Toll-Gate.*—*Affidavit.*—*Malice.*—*Mischief.*—In a prosecution, under section 66 of the act defining misdemeanors, 2 R. S. 1876, p. 479, for injuring a toll-gate, the affidavit, information or indictment need not allege either a malicious purpose or mischievous intent on the part of the defendant.

**SAME.**—*Mayor of City.*—*Authentication of Transcript.*—*Seal.*—*Justice of Peace.*—When a criminal prosecution is instituted before the mayor of a city of this State, he acts in the capacity of a justice of the peace only; and a certified transcript of such cause, on either a change of venue from him or an appeal to the circuit court, need not bear the corporate seal of the city.

**SAME.**—*Supreme Court.*—*Transcript Filed too Late.*—*Appearance.*—*Waiver.*—The transcript on an appeal to the Supreme Court having been filed more than thirty days after the appeal was taken, the appellee moved for a dismissal of the cause on that ground, but, without awaiting a decision of his motion, joined issue on the assignment of errors and submitted the cause.

*Held*, that his motion and right to a dismissal were waived.

From the Montgomery Circuit Court.

*T. W. Woollen*, Attorney General, *D. A. Roach*, Prosecuting Attorney, *L. B. Willson* and *E. C. Snyder*, for the State.

*G. W. Paul* and *J. E. Humphries*, for appellee.

**BIDDLE, J.**—Prosecution commenced against the appellee, before the mayor of the city of Crawfordsville, on the following affidavit:

“Lydia Hamilton, being first duly sworn, upon her oath says, that, on the 11th day of March, 1878, in the county of Montgomery and State of Indiana, one Richard Walters, then and there being, did then and there unlawfully injure a toll-gate, by then and there cutting a rope attached to and forming a part of said gate; said toll-gate being then and there the property of the Crawfordsville and Yountsville Turnpike Company, to the damages of said gate and company twenty-five cents. LYDIA HAMILTON.”

“Sworn to,” etc.

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This prosecution is founded on section 66, 2 R. S. 1876, p. 479, which is in the following words:

"SEC. 66. Every person who shall in any manner obstruct any highway, railroad, tow-path, canal, turnpike, plank or coal road, or injure any toll or other bridge, or toll-gate, culvert, embankment, or lock, or make any breach in any canal, or injure any material used in the construction of such roads and canal, such person, and all other persons aiding and abetting therein, shall be fined not exceeding five hundred dollars, or imprisoned not exceeding three months; and upon prosecution for obstructing a highway, it shall be sufficient to prove that it is used and worked as such."

Under this section, no malicious purpose or mischievous intent is necessary to constitute the offence.

We think the affidavit is sufficient, and that the court erred in dismissing the case.

The judgment is reversed; cause remanded for further proceedings, according to this opinion.

PETITION FOR A REHEARING.

BIDDLE, J.—The appellee makes two points in his petition for a rehearing, which were not considered in the original opinion.

1. A change of venue was taken from the mayor of Crawfordsville to a justice of the peace. Before the justice the appellee moved to dismiss the case "because the transcript from mayor Ramsey, and the certificate thereto, did not have the corporate seal of the city of Crawfordsville on said certificate or transcript." The motion was overruled by the justice. Upon appeal to the circuit court the appellee therein renewed his motion to dismiss upon the same ground. The circuit court sustained the motion, and dismissed the cause. This ruling is erroneous. The mayor had no jurisdiction of the case as the mayor of the



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city of Crawfordsville; but, by virtue of being mayor, he had, "within the limits of said city, the jurisdiction and powers of a justice of the peace, in all matters civil and criminal, arising under the laws of this State, and for crimes and misdemeanors, his jurisdiction shall be coextensive with the county in which such city is situated;" and "The same rules of pleading and practice shall be observed in the city judge or mayor's court that are in [a] justice's court." Sec. 17, 1 R. S. 1876, p. 272. While the mayor was acting as a justice of the peace, it was not necessary that he should authenticate his proceedings by "the corporate seal of the city of Crawfordsville." His transcript was authenticated in the usual form by which justices of the peace are authorized to authenticate transcripts. This was sufficient. The corporate seal is necessary to be affixed only to instruments of writing needing authentication. Sec. 49, 1 R. S. 1876, p. 287.

2. The appellant insists that the appeal ought to be dismissed because the transcript was not filed in this court within thirty days after the appeal was taken, as required by statute. The appeal was taken below on the 26th day of September, 1878; the transcript was filed in this court on the 20th day of November, 1878; the appellee, on the 17th day of December, 1878, moved in this court to dismiss the appeal, because the transcript was not filed in time; on the 20th day of December, 1878, he appeared to the case, and answered the assignment of error in this court, before his motion to dismiss was decided, and the case was submitted. By thus appearing to the appeal, joining in error and submitting the case, he waived his motion to dismiss the appeal. We can not consider it now. For the well settled doctrine of waiver in legal practice, see the following cases: *Miller v. Hays*, 20 Ind. 451; *Bradley v. The Bank of the State of Indiana*, 20 Ind. 528; *McDougle v. Gates*, 21 Ind. 65; *Preston v. Sandford's Adm'r*, 21 Ind. 156;

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*Cromwell v. Baty*, 43 Ind. 357; *Rich v. Starbuck*, 45 Ind. 310; *Davis v. Brinker*, 50 Ind. 25; *Marsh v. Elliott*, 51 Ind. 547; *Collins v. Rose*, 59 Ind. 33; *The Louisville, etc., R. W. Co. v. Nicholson*, 60 Ind. 158; *The Peoples Savings Bank, etc., v. Finney*, 63 Ind. 460.

In the case of *Winsett v. The State*, 54 Ind. 437, there was no appearance and joinder in error in this court, after the motion to dismiss was made; the ruling, therefore, does not support the views of the appellee in this case.

The petition for a rehearing is overruled.

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THE VINCENNES NATIONAL BANK v. COCKRUM ET AL

**REPLEVIN BAIL.**—*Stay of Execution.*—*Effect of.*—*Judgment.*—The effect of a recognizance of replevin bail for the stay of execution upon a judgment is that of a judgment confessed by the recognizer for the amount of the judgment, with interest thereon and costs accrued and to accrue.

**SAME.**—*Common Law.*—Such a recognizance is of statutory origin, being unknown at common law.

**SAME.**—*Informality Cured.*—Since the enactment of section 790 of the code of this State, such a recognizance is not rendered void, nor is the replevin bail discharged, for want of form or substance, or recital, or condition in the recognizance.

**SAME.**—*Recognizance for Part Binds for the Whole.*—One who enters his recognizance as replevin bail for the stay of execution on a judgment can not limit the extent of his liability, but at once becomes liable for the whole of the judgment, with interest thereon and costs, even though, by the terms of his recognizance, he undertakes thereby to limit his liability to a specified part of the judgment.

**QUERY.**—Where several persons thus become bail, each limiting his liability to a distinct proportion of the judgment, what are their rights, *inter se*, on payment of the whole judgment by either of them?

**SUPREME COURT.**—*Judgment of.*—The decisions of the Supreme Court are made by the whole court, unless the dissent or absence of some one of the judges thereof is noted in the decision.

From the Gibson Circuit Court.

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*F. W. Viehe* and *R. G. Evans*, for appellant.

*W. M. Land*, *C. Denby*, *D. B. Kumler*, *H. A. Yeager*,  
*A. Iglehart* and *J. E. Iglehart*, for appellees.

BIDDLE, J.—The Vincennes National Bank, on the 2d day of February, 1875, recovered judgment against Jacob W. Hargrove, Caleb Trippet, Richard M. J. Miller and Samuel Sterne, in the Gibson Circuit Court, for the sum of four thousand two hundred and twenty-seven dollars and fifty cents, and costs.

On the 10th day of March, 1875, an execution, in the usual form, was issued upon the judgment, in the name of the State, commanding the sheriff to levy and collect the same. The writ was delivered to the sheriff on the same day it was issued.

While in the hands of the sheriff, on the 31st day of July, 1875, a portion of the appellees entered their recognizance as replevin bail upon the judgment, in the following words:

“ We acknowledge ourselves replevin bail for the payment of Jacob W. Hargrove’s one-half of the judgment upon which the within execution has issued, together with the interest and costs accrued and to accrue thereon, at or before the expiration of the time allowed by law for the stay of such judgment.

“ JULY 31st, 1875.

“ WILLIAM L. HARGROVE,

“ WILLIAM M. COCKRUM,

“ J. H. MCCONNELL,

“ EDWARD RICKARD,

“ J. C. (his X mark) BLYTHE.

“ Taken and approved by me July 31st, 1875.

“ F. W. HAUSS, Sheriff Gibson County.”

On the same day, the other appellants entered their recognizance as replevin bail upon the judgment, in the following words:

"We acknowledge ourselves replevin bail for Caleb Trip-  
pet for the payment of the undivided one-half of the judg-  
ment upon which the within execution has issued, together  
with the interest and costs accrued and to accrue thereon,  
at or before the expiration of the time allowed by law for  
the stay of execution on such judgment.

"JULY 31ST, 1875.

"JEFFERSON TURPIN,

"JOHN SLOAN.

"Taken and approved by me July 31st, 1875.

"F. W. HAUSS, Sheriff Gibson County."

After taking and approving the replevin bail as above, the  
sheriff returned the writ accordingly.

On the 6th day of April, 1877, a second writ of execution  
was issued upon the judgment, against the judgment-debt-  
ors and all of the recognizors having so entered them-  
selves as replevin bail.

On the 22d day of September, 1877, the appellees, the  
recognizors, moved the Gibson Circuit Court to quash the  
second writ of execution, "On the ground of irregularity  
in form, and defect in substance, of said execution, and be-  
cause there is no sufficient and valid recognizance of re-  
plevin bail, in the record of said judgment, to support a  
writ of execution against the property of the said " recog-  
nizors, so entered as replevin bail upon the judgment.

The court sustained the motion, and, as to the appellees,  
quashed the writ of execution. The appellant excepted  
and appealed. The assignment of error here presents the  
single question: Are the recognizances of replevin bail,  
as above entered, valid under the statute?

The appellant insists that the recognizances are valid; that,  
though informal, all informalities are cured by section 790  
of the code; and, if not valid as to the whole amount of  
the judgment replevied, are valid as to one-half; that judg-  
ments may be apportioned as to amounts between defend-  
ants.

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The appellees insist that the recognizances, not having been taken according to the statute, are invalid, and can not be cured by section 790, and are therefore wholly void.

It is certain that we must look to statutory power in deciding the case ; for a recognizance in replevin bail on a judgment, and a stay of execution, were unknown at common law. Sec. 420, 2 R. S. 1876, p. 201, provides that a judgment debtor, by procuring one or more sufficient freehold sureties to enter into a recognizance acknowledging themselves bail for the defendant for the payment of the judgment, together with the interest and costs accrued and to accrue, may have a stay of execution, fixing the time of the stay according to the amount of the judgment. The next section, 421, declares that the undertaking in the recognizance shall be for the payment of the judgment, interest and costs that may accrue at or before the expiration of the time of the stay of execution. The statute does not provide for staying an execution by halves, or for any less amount than that of the judgment and costs. It is clear to our minds, therefore, that the recognizances under consideration must be held valid for the whole amount of the judgment stayed, interest and costs, or held wholly void.

Are the recognizances valid for the amount of the judgment stayed, interest and costs? This is the remaining question to be decided.

By section 790, 2 R. S. 1876, p. 311, it is enacted, that "No official bond entered into by any officer, nor any bond, recognizance or written undertaking taken by any officer in the discharge of the duties of his office, shall be void for want of form of substance, or recital, or condition, nor the principal or surety be discharged ; but the principal and surety shall be bound by such bond, recognizance or written undertaking, to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance."

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The case of *Hutchins v. Hanna*, 8 Ind. 533, illustrates, if it does not indeed settle, the principle which should govern us in the decision of this case. That case was as follows:

Hutchins recovered judgment against Scott, Iten & Co., in October, 1841, on notes dated August 12th, 1840. On the 8th day of December, 1841, James Barnett entered his recognizance of replevin bail on the judgment. The appraisement law was passed February 12th, 1841, and the question was, which law should govern the sale of Barnett's property, as replevin bail, the law of the contract in 1840, or the appraisement law of 1841?

We extract the following reasoning from the opinion of the court, delivered by STUART, J., which is so solid and cogent that we do not hesitate to adopt it as our own:

"The statute in force at the time in relation to replevin bail, was that of 1838. It provided for a stay of execution upon recognizance of a sufficient surety, acknowledging himself bail for the payment of the judgment; and that such recognizance should have the force and effect of a judgment confessed. \* \* \*

"It seems clear that the confession was of the particular judgment, with all its incidents and terms, only in so far as it was modified by the statute authorizing it. He adopted the contract of Scott, Iten & Co., just as it stood in the judgment. He was a joint debtor in that judgment with the principals. \* \* The judgment, as to the principals, is governed by the law of the original contract. \* \* The law of the contract \* \* was without appraisement. The legal effect of the recognizance of replevin bail, was that of a confessed judgment. That confession can not be regarded in the light of a new contract with Hutchins, for Hutchins is not really a voluntary party to it. It must, rather, be regarded as an adoption, on the part of Barnett, of the contract which Hutchins had already made with

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Scott, Iten & Co. As to the bail, therefore, it seems to us it must be the same as it is to the principals. He adopts their contract—they are joint debtors. That contract is, that the property of these joint debtors shall be sold without appraisement. This is the law virtually written out in the judgment, the terms of which he has adopted. \* \*

“The construction thus given to the law of replevin bail, while it seems natural and reasonable in itself, is due to the execution plaintiff. It has been already intimated that the contract is involuntary on the part of Hutchins. It is a contract by operation of law, and the act of a third party, to which the plaintiff’s consent is neither asked nor deemed essential. Yet are his rights and remedies postponed by it. Meantime, the principals may become insolvent. The contract of replevin bail should not, therefore, be so construed as to work injury to those who have no option but to accept it—unless, indeed, such was clearly the meaning and intention of the Legislature. In the light we view it, no violence is done either to the language or intention of the statute.”

This case arose when there was no such curative statute as section 790 of the present code. The curative statute then in force applied only to recognizances, bonds or securities, “made payable to the State of Indiana,” and did not embrace recognizances of replevin bail on a private judgment. R. S. 1838, p. 450, sec. 24. The case, therefore, was decided upon the general principles of interpreting the statute granting a stay of execution, without any curative statutes affecting it then in force.

By the statutes in force, above cited, governing the present case, section 420 gives the stay of execution by procuring a recognizance of replevin bail; section 421 declares that the undertaking of the recognizance shall be for the payment of the judgment, interest and costs; sec-

tion 790 enacts that the recognizance shall not be void for want of form of substance, or recital, or condition, nor the principal or surety be discharged; but that principal and surety shall be bound by such recognizance "to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance." The extent contemplated by the law staying an execution is, that the replevin bail shall be liable to pay the judgment upon terms the same as the principal. The restriction in the recognizance to one-half, or any other amount less than that, of the judgment, interest and costs, is a limit to the liability, which the replevin bail can not make. Such a limit would defeat the object of the law, or at least restrict the liability of replevin bail below the extent contemplated by the statute. The following cases fully support this principle: *Carnahan v. Brown*, 6 Blackf. 93; *Williams v. Beisel*, 3 Ind. 118; *Gavisk v. McKeever*, 37 Ind. 484; *Railsback v. Greve*, 58 Ind. 72; *Koeniger v. Creel*, 58 Ind. 554; *Bugle v. Myers*, 59 Ind. 73; *Fuller v. Wright*, 59 Ind. 333; *Miller v. McAllister*, 59 Ind. 491; *Yeakle v. Winters*, 60 Ind. 544; *The State v. Berg*, 50 Ind. 496.

In *Yeakle v. Winters*, *supra*, this court, in speaking of a replevin bond defective at common law, says: "Indeed, the public law makes this class of bonds, and not the private agreement of the parties; and, however informal or imperfect any such bond may be in its terms, it imposes the same obligation upon its makers as if every stipulation which the law requires was plainly written within its body." So of this case. The recognizances of replevin bail, which we are considering, however informal or imperfect they may be, are the same as if they undertook to pay the judgment, interest and costs, or as if all the requirements of the law under which they were taken were written within them in terms. They do not stand alone; they belong to the judgment, and are a part of it, and



the law is a part of them ; they must be interpreted by the law through the judgment, and no informality, imperfection, condition or limit must be allowed to defeat, contradict or embarrass the requirements which the law imposes.

The judgment plaintiff has a right to have his judgment stayed according to law, if stayed at all. The act of taking the recognizance of bail is entrusted to an officer of the law who has no power to take it except according to the law. He can not bind the plaintiff's rights in any other way. The recognizer must know, before he enters into the recognizance, that the law prescribes its terms of liability, without regard to its formality or expressed terms, and that he can enter into it in no other way. To allow a judgment to be stayed in parts, by different persons, at different times, would compel the judgment plaintiff to seek his remedy in parts, against different persons, and at different times. Such a construction of the statute would embarrass its practical working, and be clearly repugnant to the intention of the Legislature. And to hold a recognizance of bail void because it did not strictly comply with the statute would ignore section 790, and defeat the purpose intended by sections 420 and 421.

It should also be remembered that there is a manifest difference between that class of cases where a person, by some imperfect act of his own, claims a right under a statute, and the class where a person, by some imperfect act of his own, attempts to defeat a liability against him under a statute.

For the above reasons, and according to the authorities, we have come to the conclusion that the recognizances before us are as valid as if they undertook, in express terms, to pay the judgment, interest and costs, according to the requirements of the law under which they were taken. What significance, if any, the limitations in their terms may have, between the recognizers, in adjusting their

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equities with one another is not a question before us; but, as against the judgment plaintiff, who had no voice in their making, but who was compelled to submit to their terms, the limitations have no force whatever.

The appellees rely upon the case of *Montgomery v. Pierson*, 7 Ind. 97; but that case arose when there was no such healing statute as section 790, which governs the case now before us—none, except section 24, above cited from the Rev. Stat. 1838, which is not cited or referred to in the opinion. They also cite the cases of *Houglan v. The State*, 43 Ind. 537, and *Fentriss v. The State*, 44 Ind. 271; but these cases were overruled by the case of *Miller v. McAllister*, 59 Ind. 491, and of course are no longer law. They were decided upon a misapprehension of the case of *Cox v. Crippen*, 13 Mich. 502, and without any reference to section 790 of our present code, which seems to have been overlooked at that time by the counsel as well as by the court. The other cases cited by the appellees are not controlling or decisive in their favor.

The judgment is reversed, at the costs of the appellees; cause remanded, with instructions to overrule the motion to quash the writ of execution, and render judgment accordingly.

## PETITION FOR A REHEARING.

BIDDLE, J.—In the learned and forcible petition for a rehearing in this case, made applicable also to two other cases between the same parties and involving the same questions, we find no question made, nor authority cited, but such as had been before fully considered in the briefs of counsel, and in the original opinion delivered in this case; but we find some new arguments offered on behalf of the appellees.

The counsel for the appellees seem to understand our opinion as follows:

“The law says, you can not replevy by halves. The

court says, therefore you are liable for the whole. Wherefore? By the magic power of section 790."

But we do not find any such words in the opinion, nor any other words from which such propositions could be constructed, nor such meaning be fairly inferred. The substance of the opinion, however, may be stated, in brief, as follows:

"The law says, you can not replevy by halves, and says, that, if you do replevy, you must replevy for the whole. The court then says, by virtue of the law, that, as you have replevied, you are liable for the whole."

These seem to us to be quite different propositions from those stated by the counsel.

Counsel also argue as follows:

"The law requires, in numerous cases, a bond in double the amount involved, and a failure to fix the penalty at this precise sum is held a fatal omission. Suppose, in such case, the penalty should be for only one-half the required sum; under the ruling in this case the penalty must be increased, and the surety held for the whole amount; for, unless this bond be for the right amount, it will not have the proper legal effect; and every man is presumed to know the law, and this section must be construed to mean, not the amount for which the bond is conditioned, but for the amount the law requires. No one could contend for such a ruling, and wherefore? Because the section cures instruments by their terms defective in form or substance, but does not cure or change instruments perfect in form and substance, but not adapted to the purposes for which they were attempted to be used."

It may be true, as to unofficial or individual bonds, when the law requires them to be in double the amount involved, that a failure to fix the penalty at the precise sum will be held as a fatal omission. This question is not before us; we therefore neither decide it nor discuss it.

But the proposition is not true as to the official bonds, recognizances and written undertakings embraced in section 790, as the decisions cited in the original opinion will clearly show. Besides, a penal bond is a very different instrument from a recognizance of replevin bail. A penal bond is an executory, unadjudicated instrument, upon which, whatever the amount of the penalty may be, the liability of the obligor can not exceed the amount of damage suffered, upon breach, by the obligee; and, upon such a bond, it may be that no liability will ever be incurred. A recognizance of replevin bail is an executed, adjudicated instrument, a judgment by confession, wherein the amount is instantly and exactly fixed between the parties by the amount of the judgment—in popular phrase it is “the end of the law;” and when section 420 declares how such recognizance shall be executed, when section 421 declares that the undertaking “shall be for the payment of the judgment, interest and costs,” and when section 790 declares that no such recognizance “shall be void for want of form of substance, or recital, or condition, nor the principal or surety be discharged, but that the principal and surety shall be bound by such bond, recognizance or written undertaking, to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance,” and when recovery may be had upon such defective instrument, “to the same extent as if such bond, recognizance or written undertaking were perfect in all respects,” it seems to us that the logical conclusion is clearly with the opinion already pronounced in this case.

Doubtless, in cases where the law does not fix the amount, the sureties will be bound only “to the amount specified in the bond or recognizance;” but where the law fixes the amount, as in a recognizance of replevin bail, the surety can not restrict it, but will be bound, however im-

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Philippi Christian Church v. Harbaugh.

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perfect the execution of the recognizance may be, by the amount which the law prescribes. The bail can not limit his liability contrary to law; he can not say, "I will make my bond according to law, but will not be bound." Indeed, if the surety names no amount in a recognizance of replevin bail, he will be bound by the amount fixed by law. Surely, then, it is illogical to say, that, if he names half the amount, he shall be discharged entirely.

A recognizance of replevin bail, obtained by the fraud of the judgment defendant, will be binding, unless there is fraud on the part of the judgment plaintiff. *Lepper v. Nuttman*, 35 Ind. 384; *Laidla v. Loveless*, 40 Ind. 211.

The counsel conclude their petition as follows:

"We earnestly ask a rehearing of these causes, and can not refrain from the belief that a careful examination of the question by the whole court must result in arriving at the conclusion that the ruling of the court must be reconsidered."

All the decisions of this court are made "by the whole court," unless the dissent or absence of some one of the judges is noted in the decision.

The petition is overruled.

NIBLACK, J., was absent.

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PHILIPPI CHRISTIAN CHURCH v. HARBAUGH.

**BOND.**—*Replevin by Church Corporation.*—*Bond Executed by Surety Only.*—

A bond signed by the surety only, in replevin by a church corporation before a justice of the peace, is sufficient

**SAME.**—*Informality of Bond.*—Mere informality in the bond filed in such action is not fatal, but is cured by section 790 of the practice act.

From the Hamilton Circuit Court.

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Philippi Christian Church v. Harbaugh.

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*T. J. Kane* and *T. P. Davis*, for appellant.

*J. W. Evans* and *R. R. Stephenson*, for appellee.

NIBLACK, J.—This suit was commenced before a justice of the peace.

The Philippi Christian Church, on the relation of George M. Dunn, filed an affidavit before the justice, alleging, amongst other things, that said church, being an organized religious society, was the owner and entitled to the immediate possession of a record book, of the value of twenty-five dollars, of which the said Dunn was the custodian, and that Philip Harbaugh had the possession of said book without right, and unlawfully detained the same.

The transcript informs us that thereupon the plaintiff also filed a bond, as follows:

"We, George M. Dunn, Adamson B. Wiles, Alfred Bennett and Asa Malott are bound to Philip Harbaugh in the penal sum of one hundred dollars, under the conditions following: Whereas the said George M. Dunn has this day filed with Amos Carson, a justice of the peace of Hamilton county, a complaint against said Philip Harbaugh for the recovery of one record book belonging to Philippi Christian Church, and is about [to] take out a writ to replevin the same: Now, if George M. Dunn shall prosecute said complaint to effect, and return said goods to said Philip Harbaugh if judgment of return be awarded him, and pay all damages awarded him in said cause, then this bond shall be void.

"Witness our hands and seals this 8th day of July, 1876.

"GEORGE M. DUNN,

"ASA MALOTT,

"A. B. WILES,

"ALFRED BENNETT."

"Approved by me this 8th day of July, 1876.

"AMOS CARSON, J. P."

Whereupon a writ of replevin was issued to the proper

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constable, who seized the book in dispute and delivered it to the plaintiff.

The defendant entered a motion before the justice to dismiss the action, but his motion was overruled, and there was a verdict and judgment for the plaintiff in the justice's court.

In the circuit court, to which the cause was taken by appeal, the defendant renewed his motion to dismiss the action upon the ground, amongst others, that the complaint and bond were so defective as not to have authorized the issuance of the writ of replevin upon them. Pending that motion, an amended complaint and bond were filed in that court, to which no objection is pointed out to us here, but the court nevertheless sustained the defendant's motion and dismissed the action.

The appellee contends that the bond above set out, not having been signed by the appellant, was not such a bond as the statute required, and hence that the cause stood in the justice's court as if no bond had been filed by the appellant; that the appellant having in fact filed no bond, the justice had no jurisdiction of the action, citing *Dear-dorff v. Ulmer*, 34 Ind. 353, and that, as the justice had no jurisdiction, the circuit court acquired none by the appeal; that, for want of jurisdiction in the justice, the circuit court did right in dismissing the action.

We are unable to adopt the construction of the statute thus contended for by the appellee.

The act conferring jurisdiction upon justices over actions like this provides, that the plaintiff, after filing his complaint, "shall file with such justice a bond with surety, to be approved by such justice, and payable to the defendant in a sum double the value of such goods," before the justice is authorized to issue his writ for the property sued for. 2 R. S. 1876, p. 628, sec. 71.

As has been seen, the plaintiff is not required to file his bond, but a bond with surety.

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Hayes v. Hayes.

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The plain object of this provision seems to us to be to furnish the defendant with security additional to that which a simple judgment against the plaintiff would afford him. That additional security is, we think, sufficiently provided, when the sureties alone have signed the bond, with the proper approval of the justice. Such we believe to be the true construction of the act above referred to, and this view is sustained by the authorities in analogous cases. *Church v. Drummond*, 7 Ind. 17; *Abbott v. Zeigler* 9 Ind. 511.

The bond filed with the justice was in some respects informal, but, aided by the very liberal provisions of section 790 of the code, 2 R. S. 1876, p. 311, it was, in our opinion, sufficient for the purpose for which it was filed.

The court below manifestly erred in dismissing the action.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

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HAYES v. HAYES.

**PRINCIPAL AND SURETY.**—*Joint and Several Promissory Note.*—*Judgment on, Against Deceased Principal's Estate.*—*Answer by Surety.*—In an action on a joint and several promissory note, against one only of the makers, he answered that he was surety only for his co-maker, who had deceased, that the note had been filed and allowed as a claim against the estate of the principal, which was solvent, and that steps were being taken by the administrator of such estate to realize money to pay off the note in suit.

*Held*, on demurrer, that the answer is insufficient.

**SAME.**—*Plea of Suretyship.*—An answer by such defendant, alleging his suretyship, and asking that such administrator be made a party and that execution be first levied upon the property of the estate, is insufficient.

From the Dearborn Circuit Court.



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Hayes v. Hayes.

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*J. Schwartz and O. B. Liddell, for appellant.*

*W. H. Bainbridge, for appellee.*

Howk, C. J.—This was a suit by the appellee, against the appellant, to recover the amount due on a promissory note dated March 1st, 1873, executed by the appellant and one Joseph Hayes, and payable two years after date, to the appellee.

The note was the joint and several note of the makers thereof, and the appellee alleged, in her complaint, that the whole sum of money, secured by said note, was then due, owing and wholly unpaid, except the credit endorsed thereon.

The appellant answered in five paragraphs :

1. A general denial;
2. Payment;
3. Want of consideration; and,

The 4th and 5th paragraphs set up special matters which we will notice hereafter.

The appellee replied, by a general denial, to the second and third paragraphs, and demurred to the fourth and fifth paragraphs of said answer, upon the ground that neither of the two latter paragraphs stated facts sufficient to constitute a defence to appellee's action. The demurrer was sustained to each of said paragraphs, and to these decisions the appellant excepted.

The issues joined were tried by the court without a jury and a finding was made for the appellee for the amount due on the note in suit; and the appellant's motion for a new trial having been overruled, and his exception entered to this ruling, judgment was rendered by the court on its finding.

In this court, the appellant has assigned, as errors, the decisions of the circuit court, in sustaining the demurrers to the fourth and fifth paragraphs of his answer, and in overruling his motion for a new trial.

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Hayes v. Hayes.

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Substantially the same question is presented for decision by the alleged error of the court in overruling the motion for a new trial, as by the error of the court in sustaining the demurrers to the fourth and fifth paragraphs of his answer; for the causes assigned and relied upon for a new trial, in his motion therefor, were alleged errors of law, occurring at the trial and excepted to, in the exclusion of evidence offered by the appellant to establish the facts which he had pleaded in the fourth and fifth paragraphs of his answer. If, therefore, the court did not err in sustaining the appellee's demurrers to these paragraphs of answer, it is certain, we think, that no error was committed by the court in excluding the evidence offered in support of those paragraphs, or in overruling the motion for a new trial.

In the fourth paragraph of his answer, the appellant alleged, in substance, that the note sued on in this action was executed by one Joseph Hayes, then in life but since deceased, with the appellant jointly; that the note was executed by said Joseph Hayes, as principal, who received the entire consideration given or received for said note, if any was given or received, and the appellant received no consideration whatever for or on account of the execution thereof, and he executed the same for the accommodation of said Joseph Hayes, and as his surety only, and for no other consideration whatsoever; that, on the 17th day of January, 1876, the appellee filed the note in suit as a claim against the estate of said Joseph Hayes, deceased, in the clerk's office of said court, and that, on the 9th day of September, 1876, the said claim, having been transferred to the issue docket of said court for trial, was duly allowed by said court, against said decedent's estate, for the full amount then due on said note, to wit, the sum of \$2524.32; that the estate of said Joseph Hayes, deceased, was absolutely solvent and sufficient to pay debts and claims which may be outstanding against the same, in full; that the ap-

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pellant and Warren West, as the administrators of said decedent's estate, had filed in said court their petition for the sale of said decedent's real estate, to obtain the means for the payment of all claims outstanding against said decedent's estate, including the appellee's claim, and that said petition was then ready for submission to said court, and for an order that such real estate be sold for the purpose aforesaid. Wherefore the appellant said that the appellee ought not to maintain her action herein, and he asked judgment for his costs.

Strictly speaking, the fifth paragraph of the answer was in the nature of a complaint by the appellant, under section 674 of the practice act, to determine the question of his suretyship on the note in suit. 2 R. S. 1876, p. 277. In this fifth paragraph the appellant alleged substantially the same facts as he had stated in the fourth paragraph of his answer; and he asked that the administrators of said Joseph Hayes, deceased, might be made parties, and for process against them, in this suit. The relief prayed for in the fifth paragraph was, that before any execution, for the recovery and collection of whatever sum might be found due on the note sued upon, should be levied upon the appellant's property, the estate of said Joseph Hayes, deceased, the principal in said note, should be first exhausted, and all other proper relief.

It is very clear, we think, that the facts stated in the fourth and fifth paragraphs of the appellant's answer, in this case, were not sufficient to constitute any defence whatever to the appellee's action. These facts did not concern the appellee, nor affect her rights against the appellant upon the note in suit. She had a valid claim against the appellant severally; and the fact that the estate of Joseph Hayes, deceased, was also liable to her for the payment of the claim, or the further fact that she had obtained a judgment against said decedent's estate for the amount of such claim, or the further facts of the solvency

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of said estate and of the suretyship of the appellant for said decedent, would not, severally or all combined, constitute any bar to the appellee's action against the appellant.

It is expressly provided in said section 674 of the practice act, *supra*, that the proceedings of a surety to determine his rights, as between him and his principal, "shall not affect the proceedings of the plaintiff." *Joyce v. Whitney*, 57 Ind. 550, and *Johnson v. Meier*, 62 Ind. 98.

In the case last cited, the suit was upon a note against the administrator of a deceased principal and the sureties on such note. The sureties filed a complaint of suretyship, and claimed that judgment should be rendered that the estate of the deceased principal should be first exhausted, before any execution, issued on the judgment rendered on such note, should be levied on the property of the sureties, and that the court below should make an order to that effect. It was held by this court in that case, that, as between the holder of the note and the sureties thereon, the latter were not entitled to any order which would compel the plaintiff to await the settlement of the estate of the deceased principal, before collecting the money due on the note from the sureties thereon. Such an order, if made, might, and probably would, seriously "affect the proceedings of the plaintiff." We may well assume, as it seems to us, that one of the chief objects in requiring surety upon a note is, that the holder thereof may not be delayed in the collection of his money, by the possible death of the principal debtor, and the delays incident to the administration of such decedent's estate.

The case last cited is, we think, decisive of all the questions in the case now before us.

We find no error in the record of this cause.

The judgment is affirmed, at the appellant's costs, with four per centum damages.

Kissel v. Eaton.

## KISSEL v. EATON.

**MORTGAGE.—Grantee of Encumbered Lands.—Wife's Inchoate Interest.**—The wife of the grantee of lands encumbered by a mortgage has no inchoate rights in the land, as against the mortgagee.

**SAME.—Rights of Widow.—Redemption.—Partition.—Descents.**—Upon the death of the grantee, and the sale and conveyance of such lands by the sheriff pursuant to an order of sale issued upon a decree of foreclosure of such mortgage, rendered in an action to which she was not a party, his widow is entitled to redeem, but not to partition.

**SAME.—Judicial Sale.**—The decree and sale in such case do not come within the provisions of the act of March 11th, 1875, 1 R. S. 1876, p. 554, in relation to inchoate interests of married women.

From the Marion Circuit Court.

*L. Ritter, L. C. Walker and E. F. Ritter*, for appellant.

*A. F. Denny, B. Harrison, C. C. Hines and W. H. H. Miller*, for appellee.

**WORDEN, J.**—This was an action by the appellant, against the appellee, for the partition of certain land described in the complaint, the plaintiff claiming to be the owner of one-third thereof.

The defendant answered, alleging, among other things, the following facts:

That, on the 19th of October, 1872, the real estate described in the complaint was owned by one Hayden P. Anderson, who, with his wife, on that day mortgaged and warranted the property to Paul Espy, for the purpose of securing the payment of a note of even date therewith, for the sum of five thousand dollars, payable October 20th, 1873. The mortgage was duly recorded. On June 9th, 1873, Anderson and his wife conveyed the property to Peter Kissel, husband, as we suppose, of the plaintiff.

Afterward, in February, 1876, Paul Espy commenced proceedings in the Marion Superior Court to foreclose his mortgage, making parties thereto the said Anderson and Peter Kissel, and such proceedings were thereupon had,

64	248
146	51
64	248
146	639
150	408

64	248
153	535

64	248
156	319
64	248
170	313

as that afterward, on March 15th, 1876, he obtained a judgment of foreclosure, and an order for the sale of the land to satisfy the sum secured by the mortgage; that afterward, on October 7th, 1876, a duly certified copy of the decree was issued to the sheriff, by virtue of which the land was sold, after due notice, for the sum of five thousand four hundred and fifty-five dollars and thirty-five cents, the said Espy becoming the purchaser and receiving the sheriff's certificate, which was afterward assigned by him to the defendant, to whom the sheriff has executed the proper deed, the land not having been redeemed.

There are other matters, set up in the answer, not necessary to be noticed in this opinion.

The plaintiff demurred to the answer for want of sufficient facts, but the demurrer was overruled, and exception taken.

The plaintiff not replying to the answer, judgment was rendered for the defendant.

Error is assigned upon the ruling of the court upon the demurrer to the answer.

We are of opinion that the ruling was clearly right.

The answer set up a complete defence to the plaintiff's claim of title to any part of the property, or the right to have partition thereof.

When the land was conveyed by Anderson and his wife to Peter Kissel, it was encumbered by the mortgage which Anderson and his wife had executed to Espy. The plaintiff, as the wife of Peter Kissel, never acquired any inchoate interest in the land that was not subject to that mortgage. As against the mortgagee, she never had any interest in the land, inchoate or otherwise.

But, by the conveyance to her husband, she acquired an inchoate right to one-third of the land, as against all persons except the mortgagee and those claiming under him. And, for the purpose of protecting that interest, she had a

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right to redeem the mortgage. Not having been made a party to the suit to foreclose the mortgage, she still has the right to redeem. As against her, inasmuch as she was not a party to the foreclosure suit, the case stands as if there had been no foreclosure. *May v. Fletcher*, 40 Ind. 575. The purchaser under the foreclosure acquired a perfect title to the property, as against all persons who were parties to the suit, and holds it subject to the plaintiff's right to redeem the mortgage.

This right to redeem the mortgage is all the right she has in the premises, as against the defendant holding the title acquired under the sale on the foreclosure. The action was not brought to redeem the mortgage, but for the partition of the land.

The act of March 11th, 1875, 1 R. S. 1876, p. 554, vesting the inchoate interests of married women in the lands of their husbands, when the title therein of the husband has been divested by certain judicial sales, etc., seems to be relied upon by the appellant. That statute, however, has no application to the case, for the reason that the plaintiff has no inchoate interest in the land, as against the mortgagee, or the defendant claiming under him through the sale and sheriff's deed.

Her sole right is the right to redeem the mortgage, so that whatever interest in the land the law may give her as the wife or widow of Peter Kissel, in the lands of her husband, may attach thereto.

The judgment below is affirmed, with costs.

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 GREENWOOD v. THE STATE.

CRIMINAL LAW.—*Evidence.*—*Time.*—Evidence which, though silent as to the year, fixes the time of the commission of an alleged offence on the day

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Greenwood v. The State.

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and month specified in the affidavit, information or indictment, is sufficient as to the time

*SAME.—Assault and Battery.—Former Conviction.—Riot.*—A valid conviction of a defendant for an assault and battery upon one person is no bar to a prosecution for an assault and battery committed by the defendant upon another person, at the same time and place, during the continuance of a fight in which the defendant and others had engaged.

From the Steuben Circuit Court.

*L. J. Blair*, for appellant.

*T. W. Woollen*, Attorney General, and *J. W. Bixler*, Prosecuting Attorney, for the State.

PERRINS, J.—Prosecution by information, of Jay Greenwood, in the Steuben Circuit Court, for an assault and battery, committed, as charged in the information, on the 1st. day of January, 1879, in the county of Steuben, Indiana, upon the body of one John W. Griffith.

Trial, conviction, and a fine of three dollars imposed upon the appellant. A motion for a new trial, for the reason that the judgment was not sustained by the evidence, was overruled.

There was evidence tending to show that appellant committed the offence charged, upon John W. Griffith. A witness, Ora Swift, testified: "I am acquainted with defendant, Jay Greenwood. I was at Hamilton, Steuben county, Indiana, on the night of January the first, at a dance. I was leader of the band. We were playing for the dance, at that time and place. William Latson was there and got noisy. They undertook to take him down stairs. The crowd got excited, among others the defendant. I tried to stop the fuss; asked John W. Griffith [a constable] to stop the disturbance. He went up to Jay Greenwood, and asked him to go down stairs; thought he, Greenwood, struck Griffith; am certain he did strike him; think he hit him on the head."

The defendant offered and read in evidence the following transcript:



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"STATE OF INDIANA, }  
"STEUBEN COUNTY. } ss

"John W. Rogers, being duly sworn, says, that on or about the first day of January, 1879, at the county of Steuben, and State of Indiana, Jay Greenwood, in a rude, insolent and angry manner, did then and there unlawfully touch, beat and wound one Frank Kelly, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

"JOHN W. ROGERS."

• Duly sworn to.

"State of Indiana v. Jay Greenwood.

"The defendant in the above entitled cause voluntarily appeared, and waived issuance of a warrant, and submitted to the jurisdiction of the court. The case therefore being duly called, the defendant, then being present, waived arraignment, and for plea says he is guilty as charged in the affidavit herein. It is therefore considered and adjudged by the court, after a due examination of the defendant under oath, that I assess the fine at two dollars and costs, and that the defendant stand committed till the fine and costs are paid; therefore, after the defendant's hearing the decision of the court on the judgment, the defendant paid the above fine and costs in full, and was discharged.

D. N. E. BROWN, J. P. [seal.]"

The transcript of this judgment was duly certified.

It was agreed that the case stated in said transcript was the assault and battery on Frank Kelly, spoken of by the witnesses who testified in this case of The State v. Jay Greenwood.

The errors assigned are:

1. That the court erred in overruling the motion for a new trial; and,

2. In overruling the motion in arrest of judgment.

The record does not show that a motion in arrest of judgment was made.

The appellant makes two points on which he relies for the reversal of the judgment.

1. That the evidence does not show the date of the commission of the offence charged.

We may say right here that this error is not well assigned.

2. That the record of the conviction of the appellant for an assault and battery on Frank Kelly was a bar to his subsequent prosecution for an assault and battery, committed during the same evening, at the same ball, on John W. Griffith.

In *Wininger v. The State*, 13 Ind. 540, it is decided, that, when the gravamen of a riot consists in the commission of an assault and battery, a prosecution and conviction, unreversed, for the assault and battery, will be a bar to a prosecution of the same defendant, on a charge of a riot, for the same assault and battery. And in *Fritz v. The State*, 40 Ind. 18, where two persons fought by agreement, and one of the parties was prosecuted for his participation in the affair, charged as an affray, in a court of competent jurisdiction, it was held that such conviction was a bar to a subsequent prosecution for the same act, charged as an assault and battery; and this, though the affidavit upon which he was convicted of the affray was defective. See, also, *The State v. George*, 53 Ind. 434.

But such is not the question presented in this case. The question here is: Can a person, during the same evening, at a ball, commit a separate assault and battery upon each of two individuals? The evidence tends to show that, as matter of fact simply, it was done in this case. But the appellant claims that how many soever of assaults and batteries he may have committed during the period of excitement at the ball, they all amounted in law to but one offence, and that therefore the first fine inflicted for that offence, viz., that by justice Brown, for the assault and bat-

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Pierson v. Hart et al.

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tery on Frank Kelly, was a bar to all subsequent prosecutions for assault and battery committed during the period of excitement before mentioned.

We can not concur in this view. We think appellant might be prosecuted for each separate assault and battery. In this view, the question whether the conviction of the appellant for the assault and battery upon Frank Kelly, before justice Brown, was void or valid, is immaterial.

The judgment is affirmed, with costs.

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PIERSON v. HART ET AL.

SUPREME COURT.—*Dismissal of Appeal.*—*Notice to Co-Party.*—An appeal to the Supreme Court, by one of several defendants against whom a judgment has been rendered, will be dismissed for want of notice of the appeal to his co-parties.

From the Hancock Circuit Court.

R. A. Riley, for appellant.

W. R. Hough, for appellees.

Howk, C. J.—This was an action by the appellees, as plaintiffs, against the appellant and John R. Reeves, John R. Johnson, Ann Snow and Augustus W. Hough, as defendants, to foreclose a certain mortgage, and to correct a mistake in a certain promissory note, the payment of which note, it was alleged, had been secured by the mortgage.

The defendants demurred to the complaint; the demurrer was overruled, and they excepted.

The appellant, Morris Pierson, separately answered, and issues were joined thereon by proper replies.

The other defendants, Reeves, Johnson, Snow and Hough, were then called and defaulted.

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Harrington v. Dollman.

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The cause was tried by the court without a jury, and a finding was made in favor of the appellees and against the appellant and all the other defendants, for the amount of the note, and for the foreclosure of the mortgage and the sale of the mortgaged premises.

The appellant's separate motion for a new trial having been overruled, and his exception entered, judgment was rendered by the court, on its finding, against the appellant and all the other defendants.

The appellant, Morris Pierson, alone has appealed and assigned errors in this court. He has not served notice of his appeal upon all of his codefendants, and filed the proof thereof with the clerk of this court, as he was expressly required to do by the provisions of section 551 of the practice act. 2 R. S. 1876, p. 239.

For this failure of the appellant to comply with the express requirements of the statute, the point is made by the appellees' counsel, that this appeal should be dismissed.

This point is well taken, and this appeal must be dismissed for the reason given. This is in accordance with the established practice of this court, under the provisions of the section of the code above cited; and, whenever the point is made in this court, this rule of practice must be adhered to. *Harlan v. Watson*, 39 Ind. 393; *Reeder v. Maranda*, 55 Ind. 239; and *Herzog v. Chambers*, 61 Ind. 333.

The appeal in this case is therefore dismissed, at the appellant's costs.

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126	318

**MECHANIC'S LIEN.**—*Notice Claiming too Much.*—*Special Finding.*—In an action to enforce a mechanic's lien, the court found specially that the amount

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Harrington v. Dollman.

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really due to the plaintiff was much less than the amount claimed in the notice of the lien, but also found that the notice was recorded in good faith, under a mistaken opinion as to the amount due.

*Held*, the evidence not being in the record, no objection having been made to the introduction of the notice in evidence, if, indeed, it was introduced, and the complaint not having been attacked by demurrer, that the conclusion of law authorized a judgment for the plaintiff

From the Marion Superior Court.

*F. H. Levering, D. M. Bradbury and C. Ballenger*, for appellant.

*G. Carter and J. N. Binford*, for appellee.

MR. BLACK, J.—This was a suit brought by Charles Dollman against Isaac Harrington and Sarah Harrington, his wife, Andrew J. Chambers, The Travellers Insurance Company, Jacob B. Julian and Sylvester Johnson, to enforce a mechanic's lien.

The complaint stated, that, in June, 1875, the defendant Chambers employed the plaintiff to furnish all the materials for, and to erect for him, a frame dwelling-house and out-houses, plastering excepted, on a lot in the town of Irvington, in the county of Marion, of which lot the said Chambers was then the owner, for which the said Chambers agreed to pay the plaintiff the sum of two thousand three hundred and fifty dollars, to be paid as the work progressed; that the plaintiff had in all respects performed his said contract, and had, in addition, done extra work and furnished other materials to the value of sixty-four dollars and ten cents; that said Chambers had made some payments for such work and materials, leaving a balance due upon the same of one thousand six hundred and fifty dollars; that, on the 25th day of October, 1875, and within sixty days after the completion of said buildings, the plaintiff filed in the recorder's office of Marion county a notice of his intention to hold a mechanic's lien on said lot for said balance of one thousand six hundred and fifty dollars,

a copy of which notice was filed with the complaint; that, after said buildings were nearly completed, the said Chambers conveyed said lot to one William Chambers, who soon thereafter conveyed the same to the defendant Isaac H. Harrington, the present owner thereof; that the other defendants, The Travellers Insurance Company, Jacob B. Julian and Sylvester Johnson, claimed some interest in said lot as mortgagees thereof. Wherefore the plaintiff demanded judgment against the defendant Chambers for one thousand six hundred and fifty dollars, and for the enforcement of his lien against said lot.

Chambers and Harrington and wife answered in general denial. Harrington and wife also answered in three additional special paragraphs; but, as it was afterward agreed between the parties that all matters of defence might be given in evidence under the general denial, it is not necessary that we shall further notice those special paragraphs. The other defendants made default. The cause was submitted to the court, at special term, for trial and a special finding.

After stating some general conclusions from the evidence, not embraced in the special finding, the court proceeded to state, as follows:

"And the following special finding herein is now filed in the words and figures following:

"1st. The court makes a special finding in said cause, at the request of the said defendants Isaac H. Harrington and Sarah Harrington, his wife.

"2d. The plaintiff complied, substantially, with the terms of his contract, under which the building mentioned in his complaint was erected, and the materials therein mentioned were furnished to be used, and were in fact used, and the work therein mentioned was done, upon said building; the contract being to build the house for twenty-three

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hundred and fifty dollars (\$2,350.00); he did extra work, to the amount of fifty-four dollars and eighty cents (\$54.80); there is due, of interest accrued to date of decree, sixty-three dollars and nineteen cents (\$63.19); making, in all, a total of twenty-four hundred and sixty-seven dollars and ninety-nine cents (\$2,467.99).

“3d. That he caused to be recorded, in mechanic’s lien record of Marion county, Indiana, a notice of his intention to hold a lien on the real estate on which said house was erected, to wit, lot ninety (90), in Julian, Johnson, Rolls & Goode’s subdivision and addition to Irvington, for the sum of sixteen hundred and fifty dollars (\$1,650.00), October 25th, 1875, and within less than sixty days after the completion of said work.

“4th. That, at the date said lien was recorded, there was owing the plaintiff, for work done and material furnished said house, the sum of one thousand and fifty-eight dollars and fifty-four cents (\$1,058.54), on account of said work and labor done and material furnished, and there had been paid to said plaintiff, on account of said work and materials, by the defendant Chambers, the sum of twelve hundred and two dollars (\$1,202.00), prior to that date. But, prior to the time when plaintiff filed his notice of lien, as aforesaid, he had had other dealings with said Andrew J. Chambers. There had been no settlement of accounts between them, and plaintiff did not then know, nor was it ascertained until it was determined upon the trial, the exact amount which should be applied upon account of the building of the house now owned by defendant Harrington; and when plaintiff filed his notice of lien thereon, he did so in good faith, and without any fraudulent intent to falsely state therein the amount due.

“5th. That the sum of five hundred dollars (\$500.00) of this amount was subsequently paid to plaintiff, by deed, to him a certain lot in the city of Indianapolis, as pro-

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vided for in the contract, which was done before the commencement of the suit.

"6th. That there is now due the plaintiff, from the defendant Andrew J. Chambers, the sum of five hundred and fifty-eight dollars and fifty-four cents (\$558.54).

"And the court, upon the foregoing facts, finds, as a conclusion of law, that the plaintiff is entitled to a foreclosure of his lien on said real estate, and a sale thereof to satisfy said sum of five hundred and fifty-eight dollars and fifty-four cents (\$558.54), and that the equity of redemption of the said Isaac H. Harrington and wife be foreclosed and barred, except as provided by law, and decree ordered accordingly," to which conclusions of law the defendant Isaac H. Harrington at the time excepted.

Judgment was then rendered against the defendant Chambers for the amount found to be due to the plaintiff, supplemented by a decree ordering and directing the real estate above described to be sold to satisfy said judgment.

The defendant Isaac H. Harrington appealed to the general term, where he assigned, in substance, for error, that the court at special term had erred in its conclusions of law from the facts as found by it, but the judgment at special term was affirmed.

The said Harrington has further appealed to this court, assigning error upon the proceedings below, at general term.

The principal objection urged to the proceedings below is the alleged insufficiency of the notice of lien.

It is insisted, that, as the amount claimed to be due by the notice was much larger than was found to have been really due at the time it was filed, the notice was thereby shown to have been invalid as a notice of lien, not being sufficiently specific within the meaning of the statute.

The evidence is not in the record, nor is it shown that there was any objection to the introduction of the notice in evidence, or, indeed, that it was put in evidence at all.



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*The State, ex rel. Conn, v. Forry et al.*

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Nor is it made to appear that any question was raised upon the complaint as to the sufficiency of the notice. Under these circumstances, all there is before us concerning the notice is what is said in relation to it in the special finding.

The special finding, we think, satisfactorily explains the discrepancy between the amount claimed to be due and that which was found to be really due, and makes the notice appear to have been otherwise sufficient.

It was also stated in the complaint, that the defendant Chambers, on the 7th day of October, 1875, executed to the plaintiff his negotiable note, payable sixty days after date, at the First National Bank at Indianapolis, for five hundred dollars, and it is further insisted, that the execution of that note operated as a payment by Chambers of the amount for which it was given. But the special finding makes no mention of that note, and finds nothing in relation to it. The record, therefore, presents no question upon that note for our decision.

We see no error in the record, of which the appellant can complain here.

The judgment is affirmed, at the appellant's costs.

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THE STATE, EX REL. CONN, v. FORRY ET AL.

JUSTICE OF PEACE.—*Jurisdiction.*—*Recovery Demanded.*—*Judgment.*—*Joinder of Actions.*—*Replevin.*—*Embezzlement.*—In an action before a justice of the peace, wherein one paragraph of the complaint demanded the recovery of personal property valued at fifty dollars and fifty dollars damages for the detention thereof, and another paragraph demanded judgment for one hundred and six dollars "additional," for moneys alleged to have been embezzled by the defendant, judgment was rendered against the defendant by default, for one hundred and fifty-six dollars.

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The State, *ex rel.* Conn, v. Forry *et al.*

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*Held*, that the amount claimed exceeded the justice's jurisdiction, and that therefore the judgment was void.

**SAME.—Execution.—Liability of Constable.**—A constable holding an execution upon such judgment is not liable for a failure to levy and sell.

**QUERY.**—Could the justice, on motion of the defendant, recall and quash such execution?

From the Elkhart Circuit Court.

*J. M. Vanfleet*, for appellant.

*O. T. Chamberlain* and *I. N. Everett*, for appellees.

**BMDLE, J.**—Suit by the appellant, against Isaac Forry, as constable, and the other appellees, as his sureties, on his official bond.

The complaint avers the election of Forry as constable, that he gave the bond sued on, and entered upon the duties of the office, making the bond an exhibit. The breach alleged in the complaint is as follows:

That, on the 11th day of September, 1876, the relator filed his complaint before a justice of the peace, alleging that Joseph Maist unlawfully detained certain personal goods, describing them, the property of the relator, of the value of fifty dollars, alleging that the same had not been taken by virtue of an execution or other writ against him, asking a return of the property and damages for its detention in the sum of fifty dollars, all of which was verified by his affidavit; and he also gave the proper bond, which was approved. A second paragraph in that complaint charged Maist with embezzling one hundred and six dollars of the money of the relator, which he had received as his agent, demanding judgment for one hundred and six dollars "additional;" that a writ of replevin and summons were issued against Maist, which were duly served, and returned no property found, and the suit proceeded, under the statute, for damages; that Maist made default, and the justice rendered judgment against him for the sum of one hundred and

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The State, *ex rel.* Conn, v. Forry *et al.*

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fifty-six dollars, and costs, issued execution thereon, delivered the writ to Forry, as constable, to be executed; that Maist had sufficient property subject to execution, whereon to levy and make the amount of the judgment, which Forry well knew, but neglected and refused to levy thereon; that afterwards, on the 30th day of September, 1876, Maist filed a motion in writing before the justice, alleging that the judgment was void, because the amount claimed in the complaint was beyond the jurisdiction of the justice, praying that the writ of execution be quashed, and the constable ordered to return the same; that to this motion both parties appeared, the justice tried the case on the motion, held the judgment void, quashed the writ of execution, and ordered the constable to return the same; and that the constable, in obedience to the order, returned the writ, endorsed "Returned October 9th, 1876, by order of the justice." All of which is fully averred, with dates and venue.

A demurrer, on the ground of the insufficiency of the facts stated, was overruled to the complaint, and exceptions reserved.

The case was then submitted to the court, and a finding had in favor of the defendant. The appellant excepted, reserved the questions of the law under section 347 of the code, appealed to this court, and has assigned errors herein.

The appellee has also assigned, as cross error, the overruling of the demurrer to the complaint.

The facts upon which the appellant reserved the questions of law are so essentially the same as the averments in the complaint, that we think the merits of the case are presented by the cross error.

Two questions are presented by the record, and discussed in the briefs: Had the justice jurisdiction of the case? If so, had he the power to quash the writ of execution and order its return?

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The State, *ex rel.* Conn, v. Forry *et al.*

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By section 71, 2 R. S. 1876, p. 628, the jurisdiction of justices of the peace in replevin is limited, in the value of the property sought to be replevied, to one hundred dollars, and also limited, in the amount of damages claimed for its detention, to one hundred dollars; so that in no case of replevin can the jurisdiction exceed two hundred dollars, including the value of the property and the amount of the damages claimed. By section 10 of the same act, 2 R. S. 1876, p. 605, the jurisdiction of justices, in actions founded on contracts or torts, is limited in amount to two hundred dollars, except when the defendant confesses judgment. There is no class of contested cases, therefore, wherein the justice's jurisdiction in amount can exceed two hundred dollars; and we think it would be quite illogical to say that the jurisdictional amount can be increased merely by joining two classes of cases together in the same action. In the case we are considering the amount claimed, as the value of the property sought to be replevied, was fifty dollars, the amount of damages claimed for its detention was fifty dollars, and the amount claimed in the second paragraph of the complaint for embezzlement was one hundred and six dollars additional, making a sum total of two hundred and six dollars, the claim for which amount is not restricted in any part of the complaint.

The conclusion, therefore, follows irresistibly, that the justice had no jurisdiction over the amount claimed; and it also follows, that the judgment he rendered in the case was void; and, further, it follows, that a constable can not be made liable for not executing a writ issued on a void judgment. The complaint, therefore, founded on the constable's official bond, is insufficient, and the appellee's demurrer to it should have been sustained. *Bainum v. Small*, 4 Ind. 49; *Culley v. Laybrook*, 8 Ind. 285; *Guard v. Circle*, 16 Ind. 401; *Leathers v. Hogan*, 17 Ind. 242; *Boggs v. Near*, 20 Ind. 395; *Harrell v. Hammond*, 25 Ind. 104; *Caf-*

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Spaulding *et al.* v. Myers *et al.*

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*frey v. Dudgeon*, 38 Ind. 512; *Pritchard v. Bartholomew*, 45 Ind. 219; *Mays v. Dooley*, 59 Ind. 287; *Horton v. Sawyer*, 59 Ind. 587.

We do not examine the second question, as the decision of the first disposes of the case; but, should the second question arise again, the following authorities may be consulted: *Walpole v. Smith*, 4 Blackf. 304; *Culbertson v. Millhollin*, 22 Ind. 362; *Foist v. Coppin*, 35 Ind. 471.

The judgment is affirmed, at the costs of the appellant's relator.

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138 261

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SPAULDING ET AL. v. MYERS ET AL.

**FRAUDULENT CONVEYANCE.**—*Complaint to Set Aside.*—*Husband and Wife.*—*Infant.*—*Notice.*—In an action by a judgment creditor, against the judgment debtor, his wife and infant children, and a third person, to set aside, as fraudulent, a conveyance of the real estate of the debtor, executed by him and his wife to such third person, and a subsequent conveyance of the same real estate by the latter to the wife and infant children of the debtor, the complaint alleged the recovery of a judgment by the creditor, against the debtor, for a debt existing at the time such conveyances were made; that execution was issued on such judgment and returned *nulla bona*; that such conveyances were made without consideration and with intent to defraud the plaintiff; and that, at the time the first conveyance was made, the debtor did not possess other property, subject to execution, sufficient to pay the plaintiff's debt, and is now insolvent.

*Held*, on demurrer by the grantees of the second deed, that the complaint is insufficient.

*Held*, also, that the complaint should have alleged that the grantees had notice of the alleged fraud.

**SAME.**—*Cross Complaint.*—*Mechanic's Lien.*—A cross complaint in such action, by another judgment creditor, alleging the recovery of a judgment against the debtor and a contractor, on a mechanic's lien against part of the real estate conveyed, but alleging no fraud, is insufficient.

From the Clarke Circuit Court.

*J. H. Stotsenburg*, for appellants.

*Howk, C. J.*—This was a suit by the appellees, Peter

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*Spaulding et al. v. Myers et al.*

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F. and Charles H. Myers, as plaintiffs, against the appellants and four other persons, as defendants, to have certain deeds declared fraudulent and void as to them, and the real estate therein described subjected to sale in their favor.

In their complaint, the appellees, Peter F. and Charles H. Myers, alleged, in substance, that, on the 6th day of June, 1873, the defendant John Spaulding was indebted to them, as partners under the firm name of "Myers & Bro.," in the sum of six hundred and eight dollars and thirty cents, and, being so indebted, the said John Spaulding and Ella Spaulding, on the 30th day of July, 1873, conveyed to the defendant Henry S. Barnaby certain real estate, particularly described, in the city of Jeffersonville, Clarke county, Indiana; that said deed from said John and Ella Spaulding to said Barnaby was made without any consideration, and with the intent and for the purpose of defrauding and delaying the plaintiffs and the creditors of said John Spaulding, in the collection of their just debts then and there owing from said Spaulding; that said real estate was then and there the property of said John Spaulding, and subject to the payment of his debts; that on the — day of —, 1874, said Henry S. Barnaby and Eliza Barnaby, his wife, conveyed by deed said real estate to said Ella Spaulding and her children, and the appellants, Henry and John Spaulding, Jr., were then and there and still were the only children of said Ella Spaulding; that said last mentioned deed was made without any consideration, and with the intent and for the purpose of defrauding and delaying the plaintiffs and the creditors of said John Spaulding, in the collection of their just debts then and there owing from said John Spaulding; that, when said John Spaulding conveyed said real estate to said Barnaby, he, said John Spaulding, did not possess other property, subject to sale upon execution, sufficient for the payment

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*Spaulding et al. v. Myers et al.*

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of the said debt to the plaintiffs; that, on the 7th day of September, 1875, the plaintiffs recovered a judgment in the Clarke Circuit Court of Indiana, on said indebtedness of said John Spaulding to them, for the sum of six hundred and eight dollars and thirty cents, and the costs of suit; that they caused an execution to be duly issued on said judgment, and to be placed in the hands of the sheriff of Clarke county; that said sheriff afterward, on the —— day of ——, 1876, returned said execution, in substance, no property found on which to levy the same; that said John Spaulding did not possess other property subject to execution for the payment of their said judgment, or any part thereof; and that said judgment was due and unpaid.

The plaintiffs further said, that, on the 24th day of March, 1874, Francis Perry recovered a judgment in the Clarke Circuit Court, against said John Spaulding; and that, after his recovery of said judgment, said Perry died; and that the defendant Emma Perry was then the administratrix of said decedent's estate, and was made a defendant to answer as to her interest, if any, in said real estate. Wherefore, etc.

The appellee Emma Perry filed what is called a cross complaint, setting up therein the judgment mentioned in the plaintiffs' complaint, recovered by her decedent, Francis Perry, against said John Spaulding, and alleging that the judgment was unpaid. Wherefore she prayed that the deeds described in the plaintiffs' complaint might be set aside and declared fraudulent and void as to said judgment, and for other proper relief.

To this cross complaint the appellants demurred, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled by the court, and to this decision they excepted, and filed their answer to said cross complaint.

The infant appellants, Henry and John Spaulding, Jr.,

by their guardian *ad litem*, answered the cross complaint by a denial thereof.

At the September term, 1876, of the court below, the cause was "submitted to the court for finding and judgment, by the consent of parties, and the court being advised finds that the defendant John Spaulding is indebted to the plaintiffs in the sum of six hundred and fifty-two dollars and ninety-eight cents, and that the property described in the plaintiffs' complaint is liable for and subject to the payment thereof." The court then rendered judgment upon and in accordance with its finding, "and this case, as to the claim and cross complaint of Emma Perry," was continued. Afterward, at the June term, 1877, of the court below, the issues joined on the cross complaint of Emma Perry were tried by the court, without a jury, and the court found for said Emma Perry, that the deeds described in the plaintiffs' complaint were fraudulent and void as against said Emma Perry, administratrix as aforesaid, and that there was due her from said John Spaulding the sum of one hundred and fifty dollars, with interest from March 24th, 1874; and the appellants' motions for a new trial, and in arrest of judgment, having been severally overruled by the court, in the order named, and their exceptions entered to each of these rulings, judgment was rendered by the court upon and in accordance with its said finding.

From the two judgments of the circuit court, in this cause, the defendants Ella Spaulding, Henry Spaulding and John Spaulding, Jr., the last two being infants, have alone appealed to this court, and have here assigned the following alleged errors:

1. The plaintiffs' complaint did not state facts sufficient to constitute a cause of action;
2. The finding in the plaintiffs' favor was by consent, as against the infant appellants, Henry and John Spauld-



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*Spaulding et al. v. Myers et al.*

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ing, Jr., when the record showed they were infants, and could give no legal consent thereto ;

3. The overruling of the appellants' demurrer to the cross complaint of the appellee Emma Perry ;

4. The overruling of the appellants' motion for a new trial ; and,

5. The overruling of their motion in arrest of judgment.

We will consider and decide the several questions presented by these alleged errors, in the order of their assignment.

1. The first question discussed by the appellants' learned attorney, in his argument of this cause in this court, is the sufficiency of the facts stated in the complaint of the plaintiffs, Peter F. and Charles H. Myers, to constitute a cause of action. The complaint contained but one paragraph, in which the plaintiffs sought to have two deeds set aside and declared fraudulent and void as against them. The first of these deeds was executed, as the plaintiffs alleged, on the 30th day of July, 1873. If the plaintiffs had brought their action against the parties to this first deed only, for the purpose of having it only set aside and declared fraudulent and void, we think that the facts stated in their complaint would have been sufficient to constitute a cause of action against such parties for such purpose. But, when this suit was commenced, the appellants, two of whom were infants, were the owners of the real estate which the plaintiffs sought, in this action, to have subjected to the payment of a debt due them from John Spaulding, the grantor in said first deed. The appellants acquired their title to said real estate by and under a deed executed to them by Henry S. Barnaby, the grantee in said first deed from John Spaulding. It was alleged in the plaintiffs' complaint, that this second deed was executed by said Barnaby and his wife to the appellants, on the — day of —, 1874. It was necessary,

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*Spaulding et al. v. Myers et al.*

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we think, that the plaintiffs should show such facts in their complaint as would impeach the validity of both said deeds, in order to constitute a cause of action against the appellants. As to the first deed, in addition to the matters stated in the complaint, it should have been alleged therein that the appellants had had notice of those matters when the real estate in controversy was conveyed to them; and, as to the second deed, the facts stated in the complaint were clearly insufficient, for the reason that it was not alleged therein, that, when said deed was executed to the appellants, the said John Spaulding, the plaintiffs' debtor, did not have other property, subject to execution, sufficient to pay all his debts. *Pence v. Croan*, 51 Ind. 336; *Sherman v. Hogland*, 54 Ind. 578; *Eagan v. Downing*, 55 Ind. 65; *Evans v. Hamilton*, 56 Ind. 34; *Bentley v. Dunkle*, 57 Ind. 374; *Romine v. Romine*, 59 Ind. 346; *Price v. Sanders*, 60 Ind. 310.

In our opinion, the complaint of the plaintiffs, Peter F. and Charles H. Myers, in this case, did not state facts sufficient to constitute a cause of action against the appellants.

We pass now to the consideration of the third alleged error, which presents for our decision the question of the sufficiency of the facts stated in the so-called cross complaint of the appellee Emma Perry, to constitute a cause of action against the appellants.

In this cross complaint, the appellee Emma Perry, administratrix of the estate of Francis Perry, deceased, alleged, that, on the 24th day of March, 1874, by the consideration of the Clarke Circuit Court, Francis Perry recovered judgment for one hundred and fifty dollars, and costs of suit, against John Spaulding and Henry Pollock, on a mechanic's lien which Francis Perry, as sub-contractor of Henry Pollock, had on lots numbers 11 and 12 of the ground described in the plaintiff's complaint, and that said

judgment remained unpaid. Wherefore she prayed that the deeds mentioned in the plaintiffs' complaint be set aside and declared fraudulent and void as to the debt due said decedent's estate, and for other proper relief.

It is very certain, we think, that this cross complaint did not state any facts which showed that the deeds mentioned therein were fraudulent and void, or that the appellants or their real estate were liable for the payment of the debt due the estate of Francis Berry, deceased, from John Spaulding, or any part thereof. The court erred, in our opinion, in overruling the appellants' demurrer to the cross complaint of Emma Perry.

The conclusion we have reached, in regard to the insufficiency of the complaint and cross complaint in this case, renders it unnecessary for us to consider or decide the questions presented by the other alleged errors.

The judgment in favor of the plaintiffs, Peter F. Myers and Charles H. Myers, is reversed, at their costs, and the judgment in favor of Emma Perry, administratrix, is reversed, at her costs, to be levied of her intestate's estate in her hands to be administered; and the cause is remanded, with leave to the plaintiffs to amend their complaint, and with instructions to sustain the demurrer to the cross complaint of Emma Perry, and for further proceedings.

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McMAKIN ET AL. v. WESTON.

COMPLAINT.—*Uncertainty Cured by Verdict.*—A substantial cause of action, which, though defectively stated, is not attacked before verdict by demurrer or motion, will sustain a verdict and judgment.

SAME.—*Misjoinder of Parties.*—*Waiver.*—*Guarantor.*—The misjoinder of a debtor and his guarantor in an action for the debt, may be waived.

McMakin et al. v. Weston.

**SAME.—Negligence.—Refusal to Allow Plea of Non Est Factum.**—In an action upon a guaranty, wherein issue had been joined for over two years, the defendant, when the cause was called for trial, asked leave to file a plea of *non est factum*.

*Held*, that he was guilty of negligence, and that leave was properly denied.

**EVIDENCE.—Bills of Lading.—Secondary Evidence.—Common Carrier.**—

Without establishing the loss of the originals, and proving that notice has been given to the opposite party to produce duplicates of the same, which are in his possession, copies of bills of lading issued by a common carrier are not competent evidence to establish the delivery of goods for the value of which suit is brought.

From the Switzerland Circuit Court.

*J. A. Works* and *J. D. Works*, for appellants.

*T. Livings*, for appellee.

**PERKINS, J.**—Suit upon the following account and writing, the complaint containing necessary averments:

“Rodolph McMakin and Jonathan McMakin,

“To James H. Weston,	Dr.
To 5,000 feet white lightning rods,.....	\$375.00
To sundries,.....	42.35
	<hr/>
	\$417.35
Cr.,.....	163.35
	<hr/>
Balance,.....	254.00”

“MR. J. H. WESTON, VEVAY, June 15, 1872.

“*Dear Sir*: Any orders that my son Rodolph may make on you for any thing in your line, I will stand responsible for it any time this season.

“Yours truly, JONA. McMAKIN.”

“MR. J. H. WESTON, VEVAY, April 28, 1872.

“*Sir*: Please send me one thousand feet of rod. Send to-morrow if you can, and oblige,

“RODOLPH McMAKIN.”

“That will be all right. JONATHAN McMAKIN.”

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McMakin *et al.* v. Weston.

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Answer by the defendants :

1. In general denial ; and,
2. Payment.

Reply in denial of second paragraph of answer.

This was at the August term, 1874, at which, after the cause was put at issue, it was continued to the October term. Afterward it was continued from term to term, till the October term, 1875, at which term, on the 3d day of November, 1875, a motion was made by the defendant to suppress depositions of the plaintiff.

On the 9th of November, 1875, the defendant Jonathan McMakin moved to be allowed to file a paragraph of answer of *non est factum*, on the ground that he had not previously been aware that such a paragraph of answer was necessary to put the plaintiff to the proof of the execution of the written papers filed with the complaint. The motion was overruled, and exception reserved.

The motion to suppress depositions was sustained in part and in part overruled, and exceptions reserved. Trial by the court ; finding for the plaintiff in the sum of two hundred and twenty dollars ; and, over a motion for a new trial, judgment on the finding.

The defendants severally filed a motion for a new trial.

The grounds of Jonathan's motion were the rulings of the court in,—

1. Denying leave to file answer of *non est factum* ;
2. Refusing to suppress specified questions and answers, and copies of papers in depositions ;
3. Admitting certain specified questions and answers, and copies of papers, to be read in evidence ;
4. That the finding was unsustained by the evidence ;
5. That the finding was contrary to law ;
6. That the damages were excessive ; and,
7. That the court erred in assessing the amount of damages.

The grounds of the motion for a new trial by Rodolph McMakin were :

1. Finding unsustained by evidence ; and,
2. Finding contrary to law.

The assignment of errors by Jonathan McMakin is as follows :

1. The complaint does not contain a cause of action ;
2. The court erred in denying leave to answer *non est factum* ;
3. The court erred in refusing to suppress parts of depositions ;
4. The court erred in overruling the motion for a new trial.

The errors assigned by Rodolph McMakin are :

1. The complaint fails to state a cause of action ; and,
2. The court erred in overruling his motion for a new trial.

It will be observed that there was no demurrer to the complaint for any cause, and no motion touching it. The complaint states a cause of action against each defendant, and is good against both after verdict. *Scott v. Zartman*, 61 Ind. 328. A substantial cause of action, defectively stated, will sustain a verdict and judgment.

The question of misjoinder was not raised. *Goff v. May*, 38 Ind. 267. See *Leonard v. Shirts*, 33 Ind. 214 ; *McMillan v. The Bull's Head Bank*, 32 Ind. 11 ; *Philips v. Cox*, 61 Ind. 345.

The next two assignments of error by Jonathan were alleged as grounds for a new trial, in the motion therefor, and will be considered under the fourth assignment of error, viz., the overruling of the motion for a new trial, to which we now turn our attention. This cause was tried on the 9th day of November, 1875. It had then been standing at issue for over two years. To have allowed, at that time, the filing of an answer of *non est factum*, would

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McMakin *et al.* v. Weston.

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have changed the burden of proof, required additional evidence, and might have rendered a further continuance of the cause necessary; and all this on account of the gross negligence of the defendant. We can not say that there was any abuse of discretion in making the ruling complained of. *Burr v. Mendenhall*, 49 Ind. 496.

The deposition of James H. Weston was offered in evidence. A bill of exceptions shows, that, on the 3d day of November, 1875, "the defendant Jonathan McMakin moved the court to suppress the following parts of said deposition, and that he renewed his objections thereto, when the deposition was offered at the trial, viz.: Questions 4, 7, 10, 11, 14, 15, 16, 17, and the answers thereto, and exhibits attached. The court overruled the motion as to several questions and answers, and also exhibits. The exhibits were copies of bills of lading. The following statement will present the point for decision:

James H. Weston, the plaintiff in the suit, in answer to question 3, in his said deposition, deposed thus:

"I delivered to Rodolph McMakin, one of the above named defendants, the material, as I shall mention, on the several dates as mentioned, and that the prices, as mentioned, are their true value."

In question 6 he was asked: "How did you deliver the material ordered, as set forth in answer to question 3?"

Answer. "I sent part of the material as ordered, by the mail line running from Cincinnati, Ohio, to Louisville, Ky., and a part by the Ohio and Mississippi Railway Company. The mail line is called the Cincinnati and Louisville United States Mail Line Company, and is a line of common carriers."

To prove the delivery of the goods to the defendants, the appellants in this court, the plaintiff, Weston, gave in evidence, by making them parts of his deposition, copies

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of the bills of lading he received on the shipment of the goods, without proving the loss of the originals, and without proving that duplicates were in the possession of the defendants below, appellants here, or either of them, and giving them notice to produce such duplicates. On this ground was based the motion to suppress, above mentioned, and the motion to exclude on the trial. We think the court erred in overruling said motions. It appeared upon the face of the deposition, that Weston, the deponent, had the originals in his possession. We need not proceed further in the examination of the case. This error was not cured.

The bill of exceptions purports to contain all the evidence. It does not show that a foundation was laid for the introduction of copies of the bills of lading.

The judgment is reversed, with costs; cause remanded for a new trial.

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JOHNSON ET AL., SCHOOL TRUSTEES, *v.* SMITH, SCHOOL TRUSTEE.

**MANDATE.—Complaint.—Demurrer.—Practice.**—The alternative writ of mandate embodying the affidavit upon which it is issued, and not the affidavit itself, is, in legal effect, the petitioner's complaint; and a demurrer by the defendant should attack the writ and not simply the affidavit.

**SAME.—Common Schools.—Cities, Towns and Townships.—School Corporation.**—By the law of this State on the subject of common schools, each civil township, and each incorporated town and city, are distinct school corporations, entitled to receive and expend their proper school funds independent of any control by any other such corporation.

**SAME.—Town Incorporated within Township.—Custody of School Funds.**—A distinct portion of a certain township of this State having become an incorporated town, and elected school trustees, under the laws of this State,

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159	427
64	275
160	14



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the trustee of such township, after the election but before such school trustees had qualified, demanded and received of the county treasurer the school funds of the whole township, whereupon such school trustees, after qualifying, demanded of him the payment to their treasurer of the proportion of such school funds belonging to such town, which he refused; whereupon they filed an affidavit, reciting the foregoing facts, to compel him, by mandate, to pay over such moneys.

*Held*, on demurrer, that they were entitled to recover.

From the Knox Circuit Court.

*G. G. Reily, W. C. Johnson and W. C. Niblack*, for appellants:

*H. S. Cauthorn and J. M. Boyle*, for appellee.

Howk, C. J.—In this action, the appellants, as plaintiffs, applied to the court below, upon their complaint duly verified, for a writ of mandate against the appellee, as defendant. An alternative writ of mandate was issued, as prayed for in the complaint.

The appellee appeared, and demurred to the appellants' complaint. This demurrer was sustained by the court, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. To this decision the appellants excepted, and judgment was rendered on said demurrer, in favor of the appellee and against the appellants, for the costs of suit.

In this court, the appellants have assigned, as error, the decision of the circuit court, in sustaining the appellee's demurrer to their verified complaint. The question for our decision, therefore, is this: Does the appellants' complaint, in this case, state facts sufficient to constitute a cause of action?

Omitting merely formal matters, we set out this verified complaint, in substance, as follows:

William R. Johnson, William H. C. Lingo and John J. Laswell, school trustees of the town of Monroe City, Knox county, Indiana, "the plaintiffs in the above entitled ac-

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tion, respectfully show to the court, that heretofore, on the 7th day of June, 1878, they were duly and legally elected school trustees of the town of Monroe City, of Knox county, Indiana, a town incorporated under the laws of the State of Indiana; and that, on the 14th day of June, 1878, they qualified as such officers, by executing their several bonds to the approval of the auditor of Knox county, with freehold sureties; and that, on said 10th day of June, 1878, the plaintiff, William R. Johnson, was, by the said board of school trustees, duly and legally elected treasurer of said board of school trustees; and he thereafter, on the 18th day of June, 1878, executed his penal bond to the State of Indiana, in the sum of twelve hundred dollars, with two freehold sureties, neither of whom was a member of said board, which said bond was approved by the auditor of said county. They further show, that, prior to their said election and qualification as aforesaid, said Monroe City had been an incorporated town, under the laws of Indiana, for more than one year past, but that no school trustees had ever been elected or chosen, nor had any such trustees ever assumed to act as such, but, on the contrary, the free schools, and school revenues for free school purposes, had, during all that time, been managed and controlled by the defendant, as school trustee of said Harrison township, in said county. The plaintiffs further say, that the defendant is now, and has been for more than one year last past continuously, acting school trustee of said Harrison township, and that said Monroe City is situated in said township. Plaintiffs further show, that heretofore, on the second Monday of June, 1878, the auditor of Knox county, Indiana, made an apportionment of the school revenues of said county, and set apart and apportioned to said Harrison township, as the portion belonging to the inhabitants thereof, the sum of seventeen hundred and sixteen dollars and ninety-two cents (\$1716.92), on account of school

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revenue for tuition, and the further sum of twelve hundred and eighty-five dollars and seventy-nine cents, on account of special school revenue; that, by the enumeration made by said defendant and reported to the school examiner of said county, and by him reported to the auditor of said county, for the year 1878, in pursuance of the school laws of Indiana, there were on said second Monday of June, 1878, and had been for more than one year last past, eleven hundred and four children, between the ages of six and twenty-one years of age, residing in said township, who were entitled to the benefits of said school revenues for tuition, and there were, at the days aforesaid, two hundred and six children, between the ages of six and twenty-one years, residing in Monroe City aforesaid and attached to the schools thereof, making the share of said Monroe City the sum of \$319.35 of said school revenue for tuition. And the plaintiffs further say, that the whole amount of taxable property in said Harrison township, on the 1st day of January, 1877, was of the value of \$848,960, as returned by the assessor of said township, and audited by the auditor of said county, and the value of the taxable property of said Monroe City, as owned by the inhabitants thereof and the inhabitants of said school district, subject to taxation on said last named day, was the sum of \$118,580, and the whole number of polls in said school district was seventy-five. They further show, that the board of commissioners of said Knox county, at their September term, 1877, by and with the advice and consent of said trustee aforesaid, fixed the rate of taxation for special school purposes, at two dollars on each one thousand dollars' worth of property in said township, and fifty cents on each poll therein; that, by reason of the premises, there was due to said Monroe City, as its share of the special school revenue aforesaid, the sum of one hundred and eight dollars and eleven cents, which said

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several sums of money had been duly and legally placed on the tax-duplicate by the auditor of said county, and said moneys had been collected by the treasurer before the second Monday in June, 1878, and were then in his hands. The plaintiffs further say, that on said second Monday in June, 1878, the defendant wrongfully procured the auditor of said county to issue to him a warrant on the treasurer of said county for said several sums of money so belonging to Monroe City, as aforesaid, and which should have been paid to said plaintiff Johnson, and thereafter, before the commencement of this suit, he, said defendant, presented the same to said treasurer of said county, and procured the payment of said moneys to him, said defendant.

Plaintiffs further say, that there were no moneys in their hands with which to pay teachers, and pay other expenses connected with said schools, nor is there any source from which they could procure the same, and that they demanded from said defendant said sums of money, before the commencement of this suit, and he refused to pay them any part thereof, and still holds and retains the same.

“ Plaintiffs further say, that the inhabitants of said Monroe City, pursuant to a notice duly given by the directors of the schools thereof, elected teachers to teach their free schools, on the 2d day of November, 1878, and that said directors and these plaintiffs requested and demanded that the defendant should employ said teachers to teach said schools during the coming winter term, and they say that said teachers were duly qualified and commissioned to teach the same when they were so elected, and continued so to be to the present time; and they say, that said defendant refused to employ said teachers, or any other teachers to teach said schools, but, on the contrary thereof, declares, that he will not employ any teacher to teach any

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school in said Monroe City or said school district, the coming winter.

"The plaintiffs further say, there is in said town a public school-house, which has heretofore been and can still be used to teach said schools in, and that there is no reason why they should be deprived of the benefits of a school; that the school children, hereinbefore named, are still there needing and desiring school privileges, and they now bring this suit, seeking nothing but their just rights.

"They, therefore, pray the court to issue to the defendant a mandate to require him to pay to them said school moneys, or to employ said teachers to teach their schools, if the court should find, that, for any cause, they are not entitled to said money; and they will ever pray."

The foregoing complaint was duly verified by the appellants, and thereupon, as we have seen, an alternative writ of mandate was issued, as prayed for, to the appellee. Under the provisions of the practice act, in relation to mandate, as construed by this court, the alternative mandate became, in legal effect, the appellants' complaint in this suit. 2 R. S. 1876, p. 297, sec. 742, *et seq.* *The Board, etc., of Clarke Co. v. Lewis*, 61 Ind. 75; *The Board, etc., of Boone Co. v. The State, ex rel. Titus*, 61 Ind. 379; and *Moses on Mandamus*, p. 206. Strictly speaking, therefore, the appellee should have demurred, in this case, to the alternative mandate, instead of to the verified complaint on which the writ issued. But, as the writ must recite the affidavit, or verified complaint, upon which it is issued, the demurrer to the affidavit or complaint, instead of to the writ, will be regarded in this case as a mere informality.

We proceed to the consideration of the sufficiency of the appellants' cause of action.

In the 8th article of the constitution of this State, it was made the duty of the General Assembly "to provide by law for a general and uniform system of common schools,

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wherein tuition shall be without charge, and equally open to all." It was further provided, that "The principal of the common school fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of common schools, and to no other purpose whatever;" and further, that the General Assembly "shall make provision by law for the distribution, among the several counties, of the interest" of the common-school fund. These were some of the provisions of the fundamental law adopted by the people of this State in 1851.

Since the adoption of the constitution of 1851, the General Assemblies, which have from time to time been elected, have not been unmindful of the provisions of the 8th article thereof.

The law of this State in relation to our "system of common schools," in force when this suit was commenced and finally disposed of in the circuit court, was "An act to provide for a general system of common schools," approved March 6th, 1865, and the several acts since passed, amendatory of, or supplemental to, the provisions of said act. The theory of these statutory provisions is, that each and every child of the proper age, without regard to race or color, within the limits of this State, is entitled of right, and without charge for tuition, to the benefits of such an education as may be obtained in and by our common schools. To this end the entire State is divided into three classes of distinct municipal corporations for school purposes, to wit, "Each civil township and each incorporated town or city in the several counties of the State." 1 R. S. 1876, p. 780, sec. 4.

Within the territorial limits of each of these school corporations, each corporation has or ought to have, under the law, exclusive management and control of its school revenue, from whatsoever source derived, and the application

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and disbursement of such revenue to the purposes for which it was intended. In its details, the law provides, that, in each one of these school corporations, there shall be made, between the 1st of March and the 1st of May in each year, "an enumeration of the children, white and colored, \* \* between the ages of six and twenty-one years, exclusive of married persons." 1 R. S. 1876, p. 784, sec. 14.

The enumeration of children, thus annually made, forms the basis for the semi-annual distributions of the school revenues for tuition to the several school corporations throughout the State, and the amount of such revenues, thus distributed to each of such corporations; is made to depend upon the number of children between the ages of six and twenty-one years, except married persons, residing within the corporation, or transferred thereto for educational purposes.

In the case at bar, the appellants showed by the facts stated in their complaint, and admitted to be true by the appellee's demurrer thereto, that, prior to the distribution of the school revenues for tuition, made by the auditor of Knox county on the second Monday of June, 1878, to wit, June 10th, 1878, to the several school corporations within said county, the incorporated town of Monroe City was, under the law, a distinct municipal corporation for school purposes. This town of Monroe City lies within the territorial limits of Harrison township, in said county, which township was also, under the law, a distinct municipal corporation for school purposes. Monroe City had been an incorporated town, under the laws of this State, for more than one year prior to June 10th, 1878, and of course, during all that time, it had been, under and by virtue of the provisions of section 4, before cited, of the act providing for a general system of common schools, a distinct municipal corporation for school purposes. It appears, however, from the averments of the complaint, that no school trustees were

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elected for the school corporation of Monroe City, until the appellants were elected as such school trustees, on the 7th day of June, 1878. They qualified as such school trustees on the 14th day of June, 1878, by executing their several bonds, to the approval of the auditor of Knox county; and they elected the appellant William R. Johnson, as their treasurer who qualified as such treasurer, by giving bond, with sureties, as required by the statute. Before the appellants were qualified and organized as the school trustees of the school town of Monroe City, but after they were elected as such, to wit, on the 10th day of June, 1878, the appellee, as the school trustee of the school township of Harrison, within the territorial limits of which township the school town of Monroe City was situate, received from the auditor of Knox county a warrant on the county treasurer for the several sums of money, stated in the complaint, belonging to the school corporation of Monroe City, under the distribution on that day made, which warrant the appellee had presented to the treasurer, and had procured the payment to himself of the said sums of money, before the commencement of this suit. It was alleged, that, on demand made, the appellee refused to pay the appellants the said sums of money, or any part thereof.

We are clearly of the opinion, that the court erred in sustaining the appellee's demurrer to the appellants' verified complaint. Whatever sums of money the appellee had received, by reason or on account of the school children, residing within the territorial limits of the school town of Monroe City, or transferred thereto for school purposes, the appellants, as soon as they had qualified and organized, as by law required, as the trustees of said school town, had the right to demand and receive from the appellee, and he could not lawfully withhold it upon any ground. He held and had received the money in trust for the tuition of those children, and the appellants alone, as the trus-



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Pratt et al. v. Smith.

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tees of the school town, had the right under the law to apply and disburse the money to and for the purpose for which it was intended.

After the appellants were elected and qualified as the school trustees of the school town, it seems to us that the appellee had but one duty to perform in connection with the money, and that was to pay it over to the appellants, who alone were its lawful custodians and charged by law with its application and disbursement.

The amount received by the appellee, which actually belonged to the school town of Monroe City, could be easily arrived at, by a short calculation; and it was the duty of the appellee to ascertain this amount, and pay it over to the appellants, as such school trustees, upon their reasonable request. Having failed and refused to pay over the money when he was thereunto requested by the appellants, we think that they may well maintain this action, upon the facts stated, if sustained by sufficient evidence, to compel him by mandate to the discharge of his duty. The demurrer to the complaint ought to have been overruled.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

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PRATT ET AL. v. SMITH.

SUPREME COURT.—*Weight of Evidence.*—The Supreme Court, on appeal, will not disturb a verdict or finding on the mere weight of the evidence.

From the Clarke Circuit Court.

*J. K. Marsh, C. P. Ferguson and D. C. Anthony, for appellants.*

*J. H. Stotsenburg, for appellee.*

*Loeb et al. v. Weis.*

WORDEN, J.—This was an action by the appellee, who was the wife of William T. Smith, against the appellants, under the 12th section of the act of 1873, to regulate the sale of intoxicating liquors, etc., Acts 1873, p. 151, to recover damages for personal injuries inflicted upon her by her said husband in consequence of his intoxication, brought about by the sale to him of intoxicating liquor by the defendants.

The cause was tried by the court, who found for the plaintiff, and assessed her damages at thirty-five dollars, and rendered judgment, over a motion for a new trial.

The appellants have assigned as error, that the complaint did not state facts sufficient, and that the motion for a new trial should have prevailed.

The counsel for the appellant have, in their brief, properly omitted to urge any objection to the complaint, as it is clearly good.

The motion for a new trial called in question nothing but the sufficiency of the evidence to sustain the finding, there being no question raised as to the admission or exclusion of evidence.

Upon looking through the evidence, we are satisfied that it fairly justified the finding. We omit to set out the evidence, as it would subserve no useful purpose, the statute under which the action was brought having been repealed.

The judgment below is affirmed, with costs and ten per cent. damages.

LOEB ET AL. v. WEIS.

CONTRACT.—*Agreement with Debtor to Take his Property and Pay his Debts.*

—A creditor may maintain an action upon a promise, made by the defend-

64	285
146	113
64	285
157	162

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Loeb *et al.* v. Weis.

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ant to the debtor, to pay all of the debts of the latter in consideration of property sold and delivered by the debtor to the defendant.

**SAME.—Answer.—Argumentative Denial.**—The defendant in such an action answered that he had received the debtor's property and was to apply the proceeds to the payment, first, of certain specified debts, and then to the payment of debts due the plaintiff and others; that he had realized from such property its fair value and applied the proceeds to the payment of the debts specified, and that nothing remained to apply on the plaintiff's debt.

**Held,** on demurrer, that, though amounting only to an argumentative denial, the answer is sufficient.

**INSTRUCTION TO JURY.—Uncertainty.**—The court may refuse to give to the jury an instruction asked, which is indefinite and ambiguous.

From the Benton Circuit Court.

*J. M. LaRue*, for appellants.

*J. R. Troxell* and *P. H. Ward*, for appellee.

**PERKINS, J.**—John M. Weis & Co. were a mercantile firm, largely indebted. Said firm sold and transferred to Elias Weis their entire stock of goods, notes and accounts; and, in consideration of such sale and delivery, said Elias Weis promised the said John M. Weis & Co., by their firm name, to pay to the creditors of said firm all claims and demands existing against it.

Said Weis & Co. owed Loeb *et al.*, the appellants, the sum of three hundred and thirty-seven dollars and eighty-five cents, which they demanded of Elias Weis, and which he failed to pay, etc.

This suit is by said appellants, against said appellee, on his promise to Weis & Co. to pay their creditors. The complaint states a cause of action. *Miller v. Billingsly*, 41 Ind. 489, and cases cited; *Haggerty v. Johnston*, 48 Ind. 41. See *Crim v. Fitch*, 53 Ind. 214.

Answer in three paragraphs:

1. General denial;
2. Payment by Weis & Co., the original debtors; and,
3. "That the goods, notes and accounts, etc., alleged in the complaint to have been sold by said John M. Weis & Co. to defendant, were transferred and delivered to him

to be disposed of as follows, to wit, for the purpose of being appropriated by defendant to the payment, so far as they might go, of the debts which had been contracted by a prior firm, composed of said John M. Weis and Horace Case, one William R. Kennedy having succeeded to the rights and liabilities of said Case, as a member of the firm of John M. Weis & Co., and defendant having become bound in the sum of one thousand dollars to save said Case harmless, and for the further purpose of satisfying two notes held by defendant upon the firm of John M. Weis & Co., amounting to the sum of five hundred dollars, which said goods and merchandise, notes, etc., amounting nominally to about twenty-one hundred dollars, were to be converted into money by defendant as expeditiously as practicable, and in such manner as he might deem proper, and the proceeds applied, first, in satisfaction of the debts so contracted by the said Weis & Case; secondly, to the satisfaction of said notes so held by him upon said Weis & Kennedy, as hereinbefore stated; and, thirdly, to the satisfaction of the indebtedness of said firm of John M. Weis & Co., so far as the surplus would go; and defendant avers, that he sold said goods, etc., by retail and at auction, with the knowledge and consent of the said John M. Weis & Co., and that he collected said notes and accounts, so far as the same could be collected, and that he applied the proceeds of such collections to the payment of the debts of said Weis & Case, which amounted to the sum of sixteen hundred dollars. Defendant further says, that the amount of the notes and accounts uncollectible, as aforesaid, is four hundred and eighty-two dollars; that he has already paid upon the indebtedness, against which said Case was indemnified by him, as aforesaid, seven hundred and fifty dollars more than the amount realized by him from the sales and collections aforesaid, leaving the two notes held by him, as aforesaid, wholly unsatisfied." Wherefore, etc.

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*Loeb et al. v. Weis.*

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Demurrer to the third paragraph of answer for want of facts overruled, and exception entered.

Reply in denial of the second and third paragraphs of answer.

A second paragraph of reply to the third paragraph of answer averred, "that all of said goods, wares and merchandise, notes and accounts of the firm of John M. Weis & Co. was sold and delivered to the defendant, Elias Weis, by the said John M. Weis and Wm. R. Kennedy, which were of the value of thirty-five hundred dollars, and in consideration of which the said defendant, Elias Weis, undertook and agreed to pay off and discharge all and singular the debts and liabilities of the said firm of John M. Weis & Co. as they severally matured; and the defendant further agreed, in consideration of the sale and discharge of said goods, etc., so sold and delivered to him by the said John M. Weis & Co., in addition to the paying and satisfying of all the debts of said firm as they matured, to deliver over to the said John M. Weis and Wm. R. Kennedy the said notes which he held against them, as paid and satisfied. And the plaintiffs further aver, that, at the time of making said contract, the said firm of John M. Weis & Co. fully paid and satisfied said five hundred dollars of notes alleged to be held by the defendant against the firm of John M. Weis & Co. Wherefore the plaintiffs ask judgment as in their complaint demanded, and for all other and proper relief."

Trial of the issues, by agreement, by a jury of ten men. Verdict for defendant.

Motion for a new trial for the following reasons: -

"1. The verdict of the jury is contrary to the law and the evidence;

"2. The verdict of the jury is contrary to the evidence;

"3. The court erred in refusing to give charge No. 2, asked by the plaintiff, and which was excepted to at the time;

"4. The verdict of the jury is contrary to the express charge of the court."

The motion for a new trial was overruled, and judgment rendered.

The alleged errors assigned are :

1. The court erred in overruling appellants' demurrer to the third paragraph of answer; and,
2. In overruling the motion for a new trial.

We briefly notice the questions presented.

The court did not err in overruling the demurrer to the third paragraph of answer. The suit was upon an alleged promise to do a certain thing. On proof of substantially such a promise, the plaintiffs' right of recovery depended.

The third paragraph of answer averred, that the promise, on the occasion alleged in the complaint, was entirely different in its terms from what the complaint alleged it to be, setting out those terms. This was an argumentative denial of the promise alleged in the complaint. The matter alleged could have been given in evidence, under the general denial. Still the paragraph of answer contained facts constituting a defence to the action; and, while the party might have been permitted to give them in evidence under the general denial, which was pleaded, yet he had a right to plead the facts specially, and, having done so, it was not error in the court below to overrule a demurrer to such special paragraph. Such is the settled law of this State.

What is said by Judge Howk, in *Morris v. Thomas*, 57 Ind. 316, is not in conflict with our decision on this point. He says in that case, that "An argumentative denial is seldom 'good,' in pleading, for any purpose;" but the case does not decide that an argumentative denial may not, in any case, contain facts constituting a defence to an action.

We can not say that the verdict was contrary to the

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Wedekind *et al.* v. Parsons, Adm'r, *et al.*

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evidence. The evidence was conflicting as to the promise of Elias Weis, on receiving the goods mentioned.

The instruction refused was as follows :

"In this State a debtor in failing circumstances can not transfer his property to a creditor who has notice of his circumstances, to the exclusion of his other creditors. Therefore, a contract made by John M. Weis & Co. to deliver their property to Elias Weis, to secure him, to the exclusion of the other creditors, if made, would have been fraudulent and void. And if the jury finds, that the evidence as to what the contract was, by which the goods were transferred to Elias Weis, is conflicting, they are not to presume that the parties made a fraudulent sale."

The court did not err in refusing to give this instruction, because, if for no other reason, it was not sufficiently definite and plain.

The judgment is affirmed, with costs.

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WEDEKIND ET AL. v. PARSONS, ADMINISTRATOR, ET AL.

**FRAUDULENT CONVEYANCE.**—*Complaint to Set Aside.*—A complaint to set aside an alleged fraudulent conveyance of real estate by a debtor, which does not aver the insolvency of the debtor at the time of making the conveyance, is insufficient on demurrer.

**SAME.**—*Answer.*—*Evidence.*—*Harmless Ruling.*—Where, in such action, the defendant has pleaded the general denial, evidence is admissible thereunder to support the deed, and the sustaining of a demurrer to a paragraph of answer pleading such matters specially is harmless.

From the Wayne Circuit Court.

S. A. Forkner and W. W. Woods, for appellants.

H. C. Fox, for appellees.

BIDDLE, J.—Complaint, in two paragraphs, of Amos W. Parsons, administrator of the estate of William Jennings, deceased, to set aside a conveyance of certain lands, alleged to be fraudulent, and subject the lands to sale for the payment of the debts of the estate.

The first paragraph charges, that, on the 3d day of June, 1870, the appellee William Jennings, Jr., and his father, William Jennings, executed to one Esther Brister a promissory note as evidence of debt; that, on the 7th day of January, 1873, a judgment was taken against them on said note, by said Brister, in the Marion Superior Court, for the sum of \$608.05; that, on the 11th day of May, 1872, William Jennings, being the owner of certain lands situate in Wayne county, Indiana, did, "with the wicked and fraudulent intent to cheat, hinder and delay his creditors, and especially with the fraudulent intent to cheat, hinder and delay the said Esther Brister in the collection of her said note," convey said lands to the appellant Theodore Wedekind, "who took and accepted said conveyance with full notice and knowledge of the fraudulent intent and designs of said William Jennings;" that said Jennings afterwards died intestate, and the appellee Amos W. Parsons was appointed administrator of his estate; that said judgment has been presented to him for payment and allowed; that said Jennings died, seized of no lands, and had no personal property, and consequently there are no assets to pay said claim and other indebtedness; and concluding with the prayer that said lands may be sold to satisfy said indebtedness. It is alleged that William Jennings, Jr., is, and has been continuously since the rendition of said judgment, wholly insolvent.

The second paragraph is like the first, except in this: It charges, "that in said deed the consideration for said lands is falsely and fraudulently stated to be in the sum of two thousand dollars, whereas, in truth and in fact, the



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said defendant did not pay any thing whatever for said lands, but that said conveyance was purely voluntary, and made for the fraudulent uses and purposes aforesaid, and none other."

Demurrers were filed to each of the paragraphs of the complaint, for the alleged want of sufficient facts, and overruled.

An answer was filed in four paragraphs. A demurrer was filed to the second and third paragraphs of the answer, which was overruled as to the second, and sustained as to the third. Exceptions.

A trial was had by a jury, and a verdict returned in favor of the plaintiff below.

A motion for a new trial was filed and overruled. Exceptions.

Judgment on the verdict. Appeal.

The errors assigned in this court are:

1. Overruling the demurrer to the complaint;
2. Sustaining the demurrer to the third paragraph of answer; and,
3. Overruling the motion for a new trial.

Neither paragraph of the complaint is sufficient; neither avers the insolvency of the vendor at the time the deed was made. This is necessary. We have decided the question frequently, and given the reasons and authorities supporting the decision. We do not repeat the reasons here, but refer to the authorities cited below. The appellees think that such a decision "is not a correct exposition of the law, and should be modified." We think differently. *Ewing v. Patterson*, 35 Ind. 326; *Baugh v. Boles*, 35 Ind. 524; *Pence v. Croan*, 51 Ind. 336; *Morgan v. Olvey*, 53 Ind. 6; *Alford v. Baker*, 53 Ind. 279; *Sherman v. Hogland*, 54 Ind. 578; *Eagan v. Downing*, 55 Ind. 65; *Evans v. Hamilton*, 56 Ind. 34; *Bentley v. Dunkle*, 57 Ind. 374; *Romine v. Romine*, 59 Ind. 346; *Deutsch v. Korsmeier*, 59 Ind. 373; *Allen v. Vestal*, 60 Ind. 245.

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Marsh v. Prosser.

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The third paragraph of answer sets up a state of facts showing the consideration of the deed, the motive of the conveyance and its general fairness. This is no more than what the deed carries with itself, *prima facie*, and might be given in evidence under the general denial, in answer to evidence tending to show fraud. Sustaining a demurrer to this paragraph, after a trial, with the general denial in, becomes harmless.

The judgment is reversed, at the costs of the appellees, to be levied of the assets of the estate; cause remanded, with instructions to sustain the demurrer to each paragraph of the complaint, and for further proceedings.

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MARSH v. PROSSER.

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**INJUNCTION.**—*Execution on Judgment for Recovery of Lands Irregularly Vacated Without Objection.*—*Costs.*—Where, without objection by the plaintiff, an order is granted setting aside a judgment in his favor for the recovery of lands and granting the defendant a new trial, on subsequent payment of the costs accrued, and, after appearing to the action without objection during several subsequent terms of court, the plaintiff dismisses his action, orders out a writ of ejectment based on such vacated judgment, and commences a new action to recover the lands, the defendant may enjoin the execution of such writ.

From the Lawrence Circuit Court.

*N. Crooke, S. C. Willson and L. B. Willson*, for appellant.  
*G. Putnam and G. W. Friedley*, for appellee.

**Howk, C. J.**—This was a suit by the appellee, as plaintiff, against the appellant and one Isaac Newkirk, sheriff of Lawrence county, as defendants, to obtain a perpetual injunction, and such other relief as the appellee might, "in equity and good conscience," be entitled to upon the facts alleged in his complaint.

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*Marsh v. Prosser.*

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The appellee's complaint was duly verified by his oath, and the proper undertaking having been executed, approved and filed, a temporary restraining order was thereon granted by the Hon. E. D. Pearson, Judge of the court below, in vacation thereof, until its next ensuing term and the further order of the court.

At the ensuing October term, 1875, the appellant appeared specially, and moved the court to set aside the temporary restraining order, which motion was overruled, and the appellant excepted.

The appellant and his codefendant then demurred to the complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, which demurrer was overruled, and to this ruling they excepted.

The appellant and said Newkirk then refused to answer, and thereupon it was ordered by the court that the appellee's complaint be taken as confessed by the defendants thereto, and a judgment and a decree for a perpetual injunction, as prayed for by the appellee, were rendered by the court.

The appellant, Henry B. Marsh, alone has appealed to this court, and has assigned errors which call in question the sufficiency of the facts stated in the appellee's complaint to constitute a cause of action.

It is necessary to a proper understanding of the question presented, and of our decision thereof, that we should give a summary, at least, of the facts stated in the appellee's complaint.

The appellee alleged, in substance, that he, the appellee, was then in possession of certain real estate, particularly described, in Lawrence county, Indiana; that, on the 19th day of July, 1859, the appellant went into the possession of said real estate, by purchase and by virtue of a fee-simple deed thereof, which was duly recorded, and was made a part of said complaint; that the appellant, Henry B. Marsh, claim-

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*Marsh v. Prosser.*

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ed to have an interest in, or title to, said real estate; that, at the September term, 1869, of the court below, the appellant commenced a suit in ejectment against the appellee, to recover said real estate; that said suit was continued until the September term, 1870, when the court found and adjudged that the appellant was the owner and entitled to the possession of said real estate, and for the recovery by him of one cent damages for the unlawful detention thereof, and the costs of such suit; that, immediately after the rendition of said judgment, the appellee filed and made his motion for a new trial, under the statute, which was then and there granted by the court, and upon the payment of costs said judgment was ordered to be vacated; that, immediately after said order was made by the court, the appellee paid all the costs of said action to John Riley, clerk, as appeared in the fee-book in the clerk's office of said court; that, at the March term, 1871, of said court, said suit again came up for trial, under said motion, and, after certain proceedings were had therein, the suit was continued generally; that, at the September term, 1871, of the court, the suit was continued by consent; that, at the March and September terms respectively, 1872, the suit was continued, without trial; that, at the May term, 1873, the suit was set down for trial at a special term of the court, beginning July 21st, 1873; that, at said special term, the suit was again continued, at the appellant's costs, to another special term of the court, beginning October 28th, 1873, at which time the suit was dismissed by the appellant, the plaintiff herein, at his costs; all of which proceedings, had in said suit, would more fully appear from a transcript thereof, filed with and made part of the complaint in this action; that the appellant, Henry B. Marsh, at the May term, 1875, of the court below, commenced another suit against the appellee, for the recovery of the same real estate, which latter suit was still pending in said court when the

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appellee commenced this action; that the appellee believed that the appellant Marsh was confederating with others to the appellee unknown, to injure him in this respect and was contriving and fraudulently intending to still further injure the appellee in this behalf, by causing an execution to be issued on said vacated judgment, which execution the appellant had caused to be placed in the hands of the defendant Newkirk, sheriff of said county, with instructions to dispossess the appellee thereon from said real estate forthwith, which said sheriff was proceeding to do, and would do if not enjoined therefrom; that the service of said execution would be an irreparable injury to the appellee; that he was informed, and believed, that the appellant was irresponsible, and that no damages could be recovered from him; that the appellant was estopped from proceeding further on said vacated judgment by his own acts, as well as by the order of the court. Wherefore, etc.

We are clearly of the opinion, that the facts stated in the appellee's complaint, in this case, were amply sufficient to constitute a cause of action, and to entitle him to the relief prayed for therein. It is true, that, under the provisions of section 601 of the practice act, it has often been held by this court, that the payment of all costs is made a condition precedent, in actions for the recovery of real estate, to an application or motion for an order vacating the first judgment and granting a new trial of the action, as a mere matter of right. *Golden v. Snellen*, 54 Ind. 282, and cases there cited. It may be conceded, in this case, that the order of the court, mentioned in the appellee's complaint, granting him a new trial, as of right, in the original suit, and vacating the judgment therein rendered before but upon the payment of the costs of said suit, was irregular and erroneous. But the record shows, that, although the appellant was there present in court, when this irregular and erroneous order was made in the cause,

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yet he neither objected nor excepted, but, by his silence, apparently consented, thereto; and that thereafter, for full three years, the appellant appeared in said original suit, from term to term of said court, without making any objection whatever to the vacation of the first judgment, by such irregular and erroneous order, and apparently consenting thereto. After the appellant had so often appeared and taken steps in the original suit, from the September term, 1870, to the October term, 1873, without making any objection to the order vacating the first judgment and granting a new trial as of right, we think that he ought to and must be deemed to have acquiesced in such order. He can not and ought not to be permitted to enforce such vacated and void judgment, by an execution or other process thereon. This conclusion, we think, is fully warranted and authorized by the decisions of this court in the cases of *Marsh v. Elliot*, 51 Ind. 547, and *Vernia v. Lawson*, 54 Ind. 485.

In our opinion the court did not err in overruling the appellant's demurrer to the appellee's complaint, or in granting the appellee a perpetual injunction, as prayed for therein.

The judgment is affirmed, at the appellant's costs.

THE STATE, EX REL. ATTORNEY GENERAL, *v.* THE TERRE HAUTE  
AND INDIANAPOLIS R. R. Co.

SUPREME COURT.—*Superior Court.*—*Assignment of Error.*—*Practice.*—On an appeal from the special, to the general, term of the superior court no assignment of error was made; but, on appeal thence to the Supreme Court, error was there assigned upon the judgment of both general and special terms.

*Held*, that the assignment of error upon the judgment at special term was

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too late, that the assignment of error upon the judgment at general term raised no question not there assigned on appeal from special term, and that, as no error was assigned on such appeal, no question is presented to the Supreme Court for decision.

*SAME.—Negligence.—Diminution of Record.—Mistake, Inadvertence, Surprise or Excusable Neglect.*—A party appealing a cause must rely upon his own diligence and not upon that of the clerk of the lower court, to procure and file a correct transcript of the cause; and the lapse of time, after an omission by the clerk of an essential part of the record, whereby the error relied upon by him can not be considered by the appellate court, will prevent his obtaining relief from such omission as a mistake, an inadvertence, a surprise or an excusable neglect.

*SAME.—Rehearing.*—A rehearing will not be granted for the purpose of amending the transcript.

*SAME.—Affirming Judgment.—Dismissal of Appeal.*—The Supreme Court, on appeal, will not dismiss the appeal, but will affirm the judgment, where no question is presented though the appeal was properly taken.

From the Marion Superior Court.

*C. A. Buskirk, J. C. Denny, W. R. Harrison, S. Claypool, W. A. Ketcham and J. L. Mitchell*, for the State.

*B. Harrison, C. C. Hines and W. H. H. Miller*, for appellee.

BIDDLE, J.—In this case the appellee had judgment in its favor on a demurrer to the appellant's complaint, in the Superior Court, at special term.

An appeal was taken to the general term, wherein the judgment was affirmed, from which an appeal was taken to this court.

In the transcript we find this entry:

"The appellant files an abstract of the entry docket, and the following assignment of errors in this cause: [Not on file.]"

But no assignments of error appear in the transcript, as made at the general term.

In this court the appellant has properly assigned as error, that "Said court in general term erred in affirming the judgment in special term," and also assigns as error, that the court in special term erred in sustaining the de-

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The State, *ex rel.* Attorney General, v. The T. H. & I. R. R. Co.

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murrer to each paragraph of the plaintiff's complaint. This second assignment of error is made too late in this court. We have frequently decided that we can consider nothing in this court except the assignments of error made in the superior court at general term. This practice is well settled. *Huffman v. The Indiana National Bank of Indianapolis*, 51 Ind. 394; *Selking v. Jones*, 52 Ind. 409; *Alexander v. The North-Western Christian University*, 57 Ind. 466; *Miller v. The State, ex rel. Harrington*, 61 Ind. 503.

There being no assignments of error made at the general term of the superior court in the transcript, no question is presented to this court for decision.

The judgment is affirmed.

ON MOTION TO RELIEVE FROM THE JUDGMENT, OR FOR A RE-  
HEARING.

BIDDLE, J.—The appellant moves the court to be relieved from the judgment in this case, on the ground of mistake, inadvertence, surprise and excusable neglect. In support of the motion, the appellant files the following affidavits:

"James C. Denny, on his oath, says, that he is one of the attorneys in the above entitled case; that, at the time the clerk of the superior court was preparing the transcript in this case, he was informed that the demurrer to the complaint, which was filed therein, and the exhibits referred to in the complaint, were off the files and could not be found. He then had said papers supplied and then directed the clerk to complete the transcript. A few days thereafter he learned that the record was completed, and, as he now remembers, he informed Judge Claypool of the fact. After he learned that the record was completed, he procured from the clerk of the superior court the original papers in said cause; he then found the complaint, the exhibits, the demurrer to the complaint and the abstract and assignment of errors endorsed thereon, and supposed the



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same had been copied into the record which was filed in this court. He now makes a copy of said abstract and assignment of error a part of this affidavit, marked exhibit A.

"He further says that he was informed by Judge Claypool, who filed the record in this court, that he had filed a written request that the cause be argued orally; that, for this reason he did not examine a copy of the record on file in this court; he knew that the abstract and assignment of errors were with the papers a few days after the clerk had completed the transcript of the record, and therefore supposed that it was on file and with the papers at the time the record was made for this court.

"He says, that he did not examine the record on file in this court, because he supposed and believed, that the magnitude of the case would induce the court to grant an oral argument of the same, and that a time would be fixed for such argument, and that sufficient time would be obtained to examine the record and prepare for the argument; and, for this reason, he did not examine the record on file in this case.

"He further says, that, at the time the clerk called his attention to the fact that the demurrer to the complaint and exhibits were lost, he said nothing to him about the abstract and assignment of errors being off the files.

"J. C. DENNY."

"Solomon Claypool, being duly sworn, on his oath says, that he is one of the attorneys of the appellant in this case, and he believes there is merit in the appeal. He further says, that, before the transcript was made out for the Supreme Court, his attention was called to the fact that the demurrer to the complaint and an exhibit to the complaint were missing from the files, and he, the officer, assisted in supplying said missing papers, and supposed that the record was complete.

"When the record came into his hands, knowing that

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there was but one error that could be decided, he assigned that error, believing the record to be complete. The fact that the affiant's attention had been called to the two missing papers was calculated to, and the affiant supposes it did, create an impression that the transcript was correct, after said papers were supplied.

"The affiant can not now state, whether he did or did not look through the whole record before assigning or directing the errors to be assigned. But the affiant believes that he did examine the certificate of the clerk, but of this the affiant can not speak with certainty. Affiant further says, that, in the brief filed by the appellant, [he] prayed the court for an oral argument of this case, and a copy of said brief and petition is herewith filed as a part hereof.

"S. CLAYPOOL."

The transcript in this case was filed in this court, and the cause submitted by agreement, on the 17th day of November, 1876. The briefs, which were those used at the hearing of the case in general term below, were filed in this court on the 29th of January, 1877, since which date to the 25th day of November, 1878, the day upon which the case was decided by this court, it does not appear that the counsel for appellant had taken any action in the case. Thus it appears that two years elapsed from the time the appeal was taken to this court, before the final decision of the case.

How the facts that the exhibits and demurrer to the complaint were missing before the transcript was made, and that the clerk did not inform them of any other defect, were calculated to create, or did create, an impression in the mind of the counsel, that the transcript was correct, after the missing papers were supplied, is not apparent to us. It would rather seem that it ought to have awakened their attention to the fact that the transcript might be imperfect in some other respect. Nor can we see why their

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petition for an oral argument can be made an excuse for relaxing their diligence in seeing that the case was properly prepared for the argument to be heard. And surely the magnitude of the case is no excuse for their being less diligent in pursuing their rights than they otherwise would have been, if it had been of less importance.

Notwithstanding all that is stated in the affidavits, the fact appears plain to us that the counsel, from the time the appeal was taken until after the final decision was made,—a period of two years—did not examine the transcript to see that it was correct; indeed, it does not appear that they ever examined it at all; for, if they had, the diminution being so palpable, and in so material a part, they certainly would have discovered the defect.

It does not appear to us that such a state of facts could fairly be called, within the range of a sound judicial discretion, a mistake, inadvertence, surprise or excusable neglect; indeed, we very much fear, that an exercise of our discretion, holding such a state of facts sufficient, would amount to abuse. *Sheffermeyer v. The Columbia City German Building, Loan and Savings Association*, 58 Ind. 191.

The appellant also claims, that, if no other relief can be granted, we should grant their petition for a rehearing, upon the ground that the court, the transcript being defective, had no jurisdiction to finally decide the case by affirming the judgment, but that the appeal, for the reason of the defect in the transcript, ought to have been dismissed; and, in support of this view, the counsel cite section 581 of the code, which enacts, that "No appeal shall be dismissed for any informality or defect in the transcript or appeal bond, if the appellant shall correct the informality or defect within a reasonable time." 2 R. S. 1876, p. 247. We think that two years was a reasonable time to correct the informality in this transcript. Besides, we can not see how that section can require us to dismiss this appeal,

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when it forbids the dismissal of any appeal for the causes alleged against this transcript. The appeal was properly taken, the proper assignment of error was made in this court, the cause was submitted for our decision; we could not therefore afterwards, *ex officio*, dismiss the appeal. We could not dismiss it on motion of the appellee; no one but the appellant could dismiss the appeal; and, unless the appellant did dismiss it, the appellee was entitled to the judgment of this court. For these reasons we were required to decide the case and not dismiss the appeal; and no one claims that it could have been decided any other way, in the condition of the transcript, than to affirm the judgment. The authorities concur with our reasoning on this point. *Wilson v. Harrison*, 44 Ind. 468; *Bush v. The Grover and Baker Sewing Machine Co.*, 48 Ind. 258; *Russell v. Harrison*, 49 Ind. 97; *Huffman v. The Indiana National Bank of Indianapolis*, 51 Ind. 394. And the practice is settled that we can not grant a rehearing for the purpose of amending the transcript. *Warner v. Campbell*, 39 Ind. 409; *Cole v. Allen*, 51 Ind. 122.

The great magnitude of the case,—the amount claimed being one hundred thousand dollars—the fact that the State is the appellant and that the cause of action—being for the benefit of the school fund—is one of great public importance, were all forcibly urged upon us by the counsel for appellant, in their oral argument on the petition for a rehearing, but we do not perceive the force of this reasoning. The law takes no greater care of large amounts than it does of small ones, unless the latter are so infinitesimal as to fall within the maxim, *de minimis non curat lex*; nor has the interest of the State any higher claims to justice than those of the appellee or any private person; and we know of nothing of greater public importance than that the courts should decide every case before them according to the very law and the facts.

Both the motion and the petition must be denied.

## CLINE ET AL. v. MYERS.

**WARRANTY.—Breach.—Measure of Damages.—Sale of Live-Stock.**—The measure of damages for a breach of warranty of the soundness of live-stock is the difference between the real value of the stock at the time it was sold and the value which it would then have had if it had been as warranted; and this measure can not be increased by evidence of care and attention bestowed upon, and feed given to, the stock.

**SAME.—Error in Striking Out Evidence Rendered Harmless by Special Finding.**—Where the jury trying the case has found specially that there was no breach of the warranty, error in striking out evidence measuring the damages arising from the breach is not available.

From the Montgomery Circuit Court.

*W. P. Britton and M. W. Bruner, for appellants.*

*P. S. Kennedy and W. T. Brush, for appellee.*

**BIDDLE, J.**—Complaint on a promissory note, by appellee, against appellants.

The note was not denied. The defence, as to ninety-six dollars, was, that the consideration of the note was twenty head of hogs, bought of the appellee by the appellants, which were warranted to be sound, but were not sound; that they had the "hog cholera," whereby they became worthless; that the remaining portion of the consideration of the note was corn, bought at the same time with the hogs; but, as to the corn, no defence is made.

Trial by jury; general verdict for the appellee, with answers to special interrogatories, finding that the hogs were not diseased at the time they were sold to appellants; that, after they were sold, seventeen of them took the hog cholera and died, and that the hogs were worth, at the time they were sold, ninety-six dollars.

Judgment on the verdict; appeal.

Three questions are presented to us, by a motion for a new trial overruled, and exceptions reserved:

1. The insufficiency of the evidence;
2. The rejection of proper evidence; and,

## 3. Striking out proper evidence.

The evidence rejected by the court was offered to prove damages on account of care and attention given to the hogs after they were supposed to be sick, and for feed consumed by the hogs. This evidence was properly rejected. The care and feed given to the hogs were not necessary consequences of the warranty and breach alleged. The measure of damages was the difference between the value of the hogs at the time they were purchased, and their value at the same time, if they had been as they were warranted to be. This measure could not be increased by the care and feed wasted upon the sick hogs. The loss would not be the natural, necessary, legitimate result from the breach of warranty. *Page v. Ford*, 12 Ind. 46; *Overbay's Administrator v. Lighty*, 27 Ind. 27; *The Western Gravel Road Co. v. Cox*, 39 Ind. 260; *Booher v. Goldsborough*, 44 Ind. 490; *Ferguson v. Hosier*, 58 Ind. 438.

The evidence, stricken out on motion after it had been admitted, was of the same character as that rejected, and governed by the same rule. There was no error committed, therefore, in striking it out. This evidence could be useful to the case only in the event that the warranty and breach, as alleged, had been proved; and, as the jury negatived the breach by the special finding, its rejection, if improper at the time, would not have been an available error.

The evidence is conflicting, but not so discordant with the verdict as to authorize us, as an appellate court, to disturb it.

The judgment is affirmed, at the costs of the appellants.

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## WAINWRIGHT, ADMINISTRATOR, v. FLANDERS.

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**MORTGAGE.—Mistake.—Action to Reform, Against Judgment Creditor.—Purchaser Without Notice.**—A mortgage may be reformed as against the judgment plaintiff, so as to include real estate upon which a judgment is a lien, and which, by mistake, was not included in the mortgage; but such reformation can not be had as against a purchaser of such judgment for a valuable consideration, without notice of the mistake made in the mortgage.

**SAME.—Evidence of Notice.**—In an action by the holder of such mortgage, against such purchaser, to reform such mistake, of which the defendant was alleged to have had notice, the mistake being a misdescription of one of several tracts of land intended to have been included in the mortgage, the plaintiff offered to prove that the defendant had insisted on, and succeeded in, purchasing the judgment at much less than its face, by reason of the existence of the mortgage as a prior lien.

**Held,** that the exclusion of the evidence was not error.

From the Tipton Circuit Court.

*J. O'Brien, T. J. Kane, N. R. Overman, W. Garver, R. Graham, J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler,* for appellant.

*F. M. Trissal,* for appellee.

**WORDEN, J.**—This case has once before been in this court, and the decision is reported under the name of *Flanders v. O'Brien*, 46 Ind. 284. Reference may be had to that case for a statement of the general facts involved.

After the case went back from this court, the complaint was so amended as to charge Flanders with notice of the mistake in the plaintiff's mortgage, before he purchased the judgments mentioned.

Flanders answered, among other things, by general denial. William O'Brien, the original plaintiff, having died. Wainright, his administrator, was substituted as plaintiff.

The cause went on change of venue to Tipton county, for trial, where it was tried by the court, resulting in a finding and judgment for the appellee, Flanders.

The appellant, as we understand the brief of counsel, makes but two points: First, that the finding is not sustained by the evidence and is contrary to law; and second, that the court erred in excluding certain evidence offered.

When the case was in this court before, it was held, after pretty mature consideration, a rehearing in the cause having been granted, that a mortgagee could not have his mortgage reformed and corrected, as against the purchaser in good faith, for a valuable consideration, of a judgment which was a lien upon the land which was intended to be, but by mistake was not, embraced in the mortgage, the purchaser of the judgment having no notice of the mistake at the time of his purchase.

The case of *Flanders v. O'Brien*, *supra*, was cited approvingly in the case of *Busenbarke v. Ramey*, 53 Ind. 499. See, also, the case of *Burke v. Anderson*, 40 Ga. 535. The counsel for the appellant have called our attention to the case of *Strang v. Beach*, 11 Ohio State, 283, but we find nothing in that case which shakes our confidence in the correctness of the conclusion heretofore arrived at upon this point.

It is true, that such mistake may be corrected as against an original judgment creditor. He did not acquire his lien by contract. He did not advance his money to acquire his lien. His lien is an incident attached by law to his judgment. See *Burke v. Anderson*, *supra*. Not so, however, with reference to one who purchases the judgment for a valuable consideration, without notice of the mistake in the execution of the mortgage. He finds certain lands of the judgment debtor not embraced in the mortgage, on which the judgment is a lien. On the faith of such lien he advances his money and purchases the judgment. His equity is at least equal with that of the mortgage creditor, through whose negligence,



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or that of those employed by him, the mistake has been brought about, and he has the law on his side, which makes the judgment a lien on the land of the judgment defendant, subject only to the lien of the mortgage on such portions of the land as are embraced therein. The case comes within the principle laid down by Judge STORY, as follows :

"Another maxim is, that where there is equal equity, the law must prevail. And this is generally true ; for, in such a case, the defendant has an equal claim to the protection of a court of equity for his title, as the plaintiff has to the assistance of the court to assert his title ; and then, the court will not interpose on either side ; for there the rule is, '*In æquali jure melior est conditio possidentis*. And the equity is equal between persons, who have been equally innocent and equally diligent." 1 Story Eq., sec. 64 c. In a note to the section above cited it is said, "So equity will not interfere to set up a prior unsealed mortgage against a judgment creditor," citing *Pratt v. Clemens*, 4 W. Va. 443.

The counsel for the appellant say, "We do not see how Flanders can have relief against the plaintiff in this cause; under the law as stated in Story's Equity Jurisprudence, 11th ed., sec. 165."

This is not quite the correct way of putting the case involved. Flanders is not seeking relief against the plaintiff. He desires simply to be let alone in the possession of his legal right to the lien which the law gives him by his judgment, upon the land not embraced in the plaintiff's mortgage, undisturbed by any supposed equity in the plaintiff to have his mortgage corrected, and thereby gain a priority over him. It is the plaintiff who is seeking, by the aid of supposed equitable principles, to obtain relief against the lien of the judgments which Flanders has purchased, and to obtain priority.

Section 165 of the learned author's commentaries, above alluded to, is as follows :

"In all cases of mistake in written instruments, courts of equity will interfere only as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them, with notice of the facts. As against *bona fide* purchasers for a valuable consideration without notice, courts of equity will grant no relief; because they have, at least, an equal equity to the protection of the court."

The counsel for the appellant, after quoting the above section, say, "This is the entire section, in support of which numerous authorities are cited as supporting the doctrine contained in the section. We do not repeat the citation of authorities here because they are not within our reach, but are in the library to which this court has access."

We have examined all the authorities cited in the notes to the section above quoted, and have found no case which holds that a mortgage will be corrected as against the purchaser of a judgment in good faith and for a valuable consideration, without notice of the mistake. Indeed, we have found no case which, in our opinion, is at all in conflict with the view which we have taken of the question.

Upon an examination of the evidence in the cause, we can not say that it was shown that Flanders, when he purchased the judgments, had any notice that any land was intended to be embraced in the mortgage, which was not embraced in it. In other words, we can not say that the finding was not sustained by the evidence.

We come to the excluded evidence.

One McCole had sold to Flanders a judgment against James O'Brien, and the plaintiff, having examined McCole as a witness in relation to the assignment of the judgment to Flanders, proposed to prove by him "that he sold his judgment against James O'Brien to the defendant, for the sum of fifty cents on the dollar, and that Flanders was

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using the plaintiff's mortgage as an inducement to witness to sell his said judgment at a sacrifice." This evidence was excluded, and the plaintiff excepted.

Ezra Swain, who also sold to the defendant a judgment against James O'Brien, was examined by the plaintiff as a witness, and the plaintiff offered to prove by him, "that, on account of plaintiff's mortgage, which defendant Flanders represented to be the oldest lien upon the land, he was induced to sell, and did sell, his judgment to Flanders, for the sum of fifty cents on the dollar." This evidence was also rejected, and exception taken.

We can not say that any error was committed in the rejection of the evidence.

The fact, if it be a fact, that Flanders bought the judgment for fifty cents on the dollar, does not show that he was not a purchaser for a valuable consideration, nor does it tend to show that he had any notice of the mistake in the mortgage. Nor does the fact, that Flanders used the plaintiff's mortgage as an inducement to the judgment creditors of James O'Brien to sell their judgments, representing that it was the oldest lien on the land, have a tendency to show that he had any notice of the mistake in the mortgage. There were three tracts of land described in the mortgage. In one of the descriptions the south-east quarter of a section is mentioned, whereas the south-west quarter of that section was intended. The utmost that can be made of Flanders' statement as to the lien of the mortgage is, that it was the oldest lien upon the land described in the mortgage. The plaintiff did not offer to prove that Flanders, in any of the conversations, said or intimated that the mortgage was a lien on the south-west quarter of the section mentioned, which by the mistake was not embraced in the mortgage.

There is no error in the record.

The judgment below is affirmed, with costs.

Petition for a rehearing overruled.

BROWNLEE, ADMINISTRATOR, v. HARE ET AL.

**SUPREME COURT.—Evidence.—Record.—Bill of Exceptions.**—Where, on appeal to the Supreme Court, it appears by the record that it does not contain all the evidence given on the trial of the cause, that court will not disturb the judgment rendered below, on any question as to the weight or sufficiency of the evidence.

**SAME.—Agreement to Submit.—Master Commissioner.—New Trial.—Trial without Issue.**—Where the parties to a cause agree in writing, that the cause shall be heard and decided upon the evidence taken and reported by a master commissioner appointed by the court, neither party can, after decision, be heard to complain that no issue had been formed in the cause.

**SAME.—Objections to Administrator's Report.—Arrest of Judgment.—Parties.—Set-Off.—Counter-Claim.**—Where objections are filed to the allowance of the final settlement report of an administrator, he stands as plaintiff, and the objector as defendant, in the proceeding; and a motion by the administrator in arrest of judgment, on account of the insufficiency of the objections, presents no question for decision, unless the defendant has answered by way of set-off, counter-claim or other affirmative plea, and the finding of the court is founded thereon.

**SAME.—Motion in Arrest, When Made.**—A motion in arrest must precede the judgment sought to be arrested.

**SUPREME COURT.—Assignment of Error.—Motion.—Record.**—No question can be presented to the Supreme Court in relation to a motion made in the court below, which the record shows was never decided.

**SAME.—Judgment Without Objection and Exception.—Contempt.**—A judgment was rendered against an administrator, without objection or exception of record, that he be attached as for contempt of court, should he fail to pay over certain trust funds in his hands, within a certain time. By a bill of exceptions it appeared, that, at the time of its rendition, he objected to such judgment as exceeding the power of the court.

**Held,** that no question as to the form or substance of such judgment is presented to the Supreme Court.

**Held,** also, that, to present such question, the record should show an objection to the rendition of such judgment, the overruling of the objection, and an exception to the ruling.

From the Grant Circuit Court.

J. Brownlee and H. Brownlee, for appellant.

G. T. B. Carr, for appellees.

64	311
127	422
64	311
138	599
64	311
140	350
64	311
159	608
64	311
165	15

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Howk, C. J.—At the April term, 1876, of the court below, the appellant, the administrator of the estate of David W. St. Clair, deceased, submitted to the court his final settlement report, duly verified, of said estate.

In this report, the appellant showed to the court, in substance, that the means that came into the hands of said administrator, and the only means that belonged to said decedent's estate, were, in the first place, a claim in favor of said decedent against one Silas Braffitt, who was the decedent's guardian, which claim the administrator undertook to collect at the instance of the officers of Grant county, who before that time had charge of said decedent, who was a pauper without children or their descendants; that said administrator undertook his said trust for the purpose of collecting said claim, and recovered a judgment against said Braffitt for the amount in his hands, with interest at ten per cent.; that said administrator caused a tract of land to be sold, which was purchased by him and sold on time for one thousand dollars, a small part of the purchase-money for the land being paid by said administrator out of his own means, and the remainder by said claim; that about the time the said land was so sold, the heirs of said decedent, who were his brothers and sisters, claimed that they were entitled to said estate or means, and it was so determined in a suit by the county of Grant against said administrator; that said heirs or those who were of age, and said administrator, entered into agreements as to the shares and amounts that each of said heirs was to receive, which were adopted by each of said heirs as they became of age; that, according to the terms of said agreement, the appellant had paid the appellees, Sarah A. Hare and Silas B. and William H. St. Clair, each, the sum of ninety dollars, the appellee Lydia J. Brown the sum of one hundred dollars, and the appellee John B. Jumper, guardian of Lydia B. Jumper, the sum of one hundred and ten dollars, and he had also paid

the costs in said estate; that according to said agreements and compromises, made with each of said parties, there was due to the appellee Mrs. Hare the sum of five dollars and thirty-eight cents, and to the appellees Silas B. and William H. St. Clair, each, the sum of four dollars and sixty-six cents; that the appellee Lydia J. Brown, after she became of age, by her husband's direction agreed to receive one hundred dollars in full for her share, and she has been paid the sum of one hundred and ten dollars; that the foregoing was all the estate of said decedent with which the appellant was chargeable, with the credits to which he was entitled, and the appellant asked that said estate be declared settled.

The appellees filed written objections to said final settlement report, and prayed the court to require the appellant to make a more full and complete report. The appellant neither demurred to nor answered the appellees' objections to his report, nor was there any action then had by the court thereon. By the written agreement of the parties then filed, the court ordered that the cause should be referred to a master commissioner, who was to take all the evidence offered by either of the parties, and report the same to the court, at its next term, and it was expressly agreed, "that on the report of the evidence, so made by said commissioner, the judge of this court is to render such judgment to the parties, or either of them, as the evidence so reported might warrant and authorize."

At the September term, 1876, the master commissioner reported to the court the evidence taken by him in this cause. Upon this evidence, the court found that the appellant, as administrator of said decedent's estate, was chargeable with the sum of one thousand dollars, and allowed him the use and interest of said sum, in full for his services and expenses as such administrator, and that there then remained, in the hands of said administrator,

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Brownlee, Administrator, v. Hare *et al.*

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the sum of five hundred and twenty dollars, after allowing him the sum of four hundred and eighty dollars theretofore paid to the heirs of said decedent. The court then ordered the appellant to pay into court the said sum of five hundred and twenty dollars, for distribution to the heirs of said decedent, and to pay the costs of this suit.

The appellant's motion for a new trial was overruled, and his exception was entered to this decision; and thereupon the court further ordered, that the appellant pay over the said sum of five hundred and twenty dollars, the amount then in his hands unappropriated, within sixty days, and that, in default thereof, he be attached as for contempt of the court, from all of which the appellant now prosecutes this appeal to this court.

The appellant has here assigned, as errors, the following decisions of the circuit court:

1. In overruling his motion for a new trial;
2. In overruling his motion in arrest of judgment;
3. In overruling his motion to set aside the objections filed by G. T. B. Carr, Esq., for the reasons that said objections do not state the names of the objectors, nor do they deny the statements of the report, nor do they deny nor in any way gainsay the vouchers filed;
4. In making the order to attach the appellant unless the amount found by the court to be due was paid; and,
5. The whole proceeding and judgment of the court was unauthorized and void.

We will consider and decide the several questions presented by these alleged errors, in the order of their assignment.

1. In his motion for a new trial, the following causes therefor were assigned by the appellant:

- 1st. That the evidence did not sustain the finding of the court;
- 2d. There was no issue in said case; and,

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3d. The finding and order were contrary to law, and were not sustained by the evidence.

The bill of exceptions, which is found in the record, shows upon its face that it does not contain "all the evidence given in the cause." The clerk of the court below certifies, in the body of the bill of exceptions, that some of the evidence is "omitted by order of appellant," and again that "the deeds, papers and records, required as above by the bill of exceptions to be here inserted, are omitted by direction of appellant." It is firmly settled by the decisions of this court, that where, as in this case, it is apparent on the face of the bill of exceptions, that it does not contain all the evidence adduced on the trial, this court will not reverse the judgment of the court below on any question as to the weight or sufficiency of the evidence. *Railsback v. Greve*, 58 Ind. 72; *Gale v. Parks*, 58 Ind. 117; *Buskirk Practice*, 149, and authorities there cited. The appellant can not assign, as a cause for a new trial, that there was no issue for trial in this case. The record shows that he agreed in writing, that the cause should be heard and decided upon the evidence taken and reported by the master commissioner, and, after the finding and decision of the court thereon, he can not be heard to complain that there was no issue in the cause. From the record, as he has presented it to us, we can not say that the court erred in overruling his motion for a new trial; and, as all the presumptions are in favor of the correctness of that ruling, we are bound to say, the contrary not appearing, that the court did not err in that decision. *Myers v. Murphy*, 60 Ind. 282.

2. The appellant's motion in arrest of judgment was in writing, and the following causes therefor were assigned therein :

1st. The objections filed in this cause did not state facts sufficient to constitute a cause of action or defence ;



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2d. The objections did not specify the names of the objectors, or the interest they might have ; and,

3d. The court was not authorized to make the order to attach the appellant, for the reason that the same was not demanded by the objectors, nor was this a case where there was a concealment of property or money.

From the first of these causes, it would seem that the appellant was somewhat in doubt as to whether he was the plaintiff or the defendant in this case, in the circuit court. He was the moving party in the case, and was seeking to have his final settlement report of his trust approved, and to be discharged therefrom by the court. As the record comes to us, he must be regarded as the party plaintiff, and the appellees, who were objecting to the approval of his report, and were insisting that he should render to the court a definite, accurate and full report of his trust, must be regarded as parties defendants in this case.

Viewed in this light, the appellant's motion in arrest of judgment, in this case, was simply a mistake on his part. In his final report, he asked the judgment of the court, declaring the estate of his decedent settled ; and certainly he did not wish to have that judgment arrested.

As a general rule, the object and purpose of a motion in arrest of judgment are to test, after finding or verdict, the sufficiency of the facts stated in the plaintiff's complaint or petition to constitute a cause of action, and to authorize the rendition of a judgment thereon. If, however, the defendant has answered by way of set-off, counter-claim, or other affirmative pleading, in which he has asked affirmative relief, and it is apparent that the finding or verdict is founded thereon, we do not doubt, that, in such a case, the plaintiff's motion in arrest of judgment would test the sufficiency of the facts stated in such affirmative pleading to authorize affirmative relief, and would reach any defect therein, not cured by the finding or verdict. Buskirk Practice, 264, *et seq.*, and authorities cited.

It is clearly manifest, we think, from the third cause assigned in the appellant's motion in arrest of judgment, that the motion was not made until after the final order or judgment in the cause was made or rendered. The final order or judgment of the court was, as we have seen, that if the appellant should fail to pay over, within sixty days, the amount found to be in his hands belonging to the heirs of his decedent, then he should be attached as for a contempt of the court. The third cause assigned in the motion in arrest was, it will be seen, that the court was not authorized to make the order to attach the appellant. This indicates clearly and conclusively, we think, that the motion in arrest was not made by the appellant until after the court had made and rendered its final order and judgment. It is well settled, that the motion in arrest must precede the rendition of judgment, and can not be made after judgment. *Smith v. Dodds*, 35 Ind. 452; *Buskirk Practice*, 264, *et seq.*, and the authorities cited. We are clearly of the opinion, therefore, that the appellant's motion in arrest in this case was made too late, and that no question for our decision is thereby presented.

3. The third alleged error is the decision of the circuit court, in overruling the appellant's motion to set aside the objections to his final settlement report, filed by G. T. B. Carr, Esq., as attorney for the heirs of the decedent. It appears from the bill of exceptions in this case, that, on the 18th day of September, 1876, the appellant filed a written motion to reject and set aside the objections to his final report, for certain reasons specified in said motion; but the record wholly fails to show that the court ever decided said motion, or that any exception was saved or reserved by the appellant to any decision thereof. This third error, therefore, is not found in the record, and of course presents no question for our decision.

4. The fourth error complained of by the appellant is

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the final order of the court, that if the appellant failed to pay over, within sixty days, the amount of money found to be in his hands, belonging to the heirs of his intestate, then he should be attached as for a contempt of the court. The entry of this final order or judgment, as the same appears in the record, does not show that the appellant objected or excepted at the time, either to the form or substance of the whole or any part of such order or judgment. In the bill of exceptions is the following statement, which apparently has reference to the final order, or judgment of the court in this case, to wit: "Said administrator objected at the time to said finding, order and judgment rendered in said cause, for the reason, as claimed by him, that the court had no power or authority to render said order and judgment." The record fails to show that the court, in terms, overruled these objections, or that the appellant excepted to any such decision. An objection is not an exception in any legal sense. An objection may not be insisted on; if overruled or sustained, the party aggrieved by such ruling must except thereto at the time, in the mode prescribed by law, or he can not afterward complain of it. It is firmly settled by the decisions of this court, that unless an exception is taken and entered in the record, at the time and in the manner prescribed by the statute, the objection will be waived. Buskirk Practice, 289, and authorities cited.

It follows, therefore, that the fourth alleged error is not properly saved in the record, and presents no question for our decision.

5. The fifth error is, that the whole proceeding and judgment of the court were unauthorized and void. The appellant has failed to save and present any question, in the record, which would enable us to say that the proceeding and judgment of the court in this case were unauthorized and void. It will be readily seen, from what we have al-

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ready said, that the appellant is in no condition to complain in this court of the proceedings and judgment of the circuit court, in this case.

We find no error in the record.

The judgment is affirmed, at the appellant's costs.

Petition for a rehearing overruled

## THE CITY OF LOGANSPORT v. CROCKETT.

**CITY.—Common Council.—Resolution Removing City Attorney.—Record of Yeas and Nays.**—On the adoption of a resolution by the common council of a city, removing the city attorney, the yeas and nays thereon must, under section 78 of the act "for the incorporation of cities," etc., 1 R. S. 1876, p. 309, be taken and entered of record.

**SAME.—Resolution Fixing City Attorney's Salary.**—The yeas and nays must, in like manner, be taken and entered of record on the adoption of a resolution by the common council, fixing the salary of the city attorney.

**SAME.—Parol Evidence of Yeas and Nays Incompetent.**—Parol evidence is inadmissible to prove the yeas and nays on the adoption of a resolution by the common council of a city, removing the city attorney; the record, or a duly authenticated copy thereof, being the only competent evidence of such fact.

**SAME.—Omission of Yeas and Nays by City Clerk.—Nunc Pro Tunc Entry.**—Where the city clerk has failed to keep the record of the yeas and nays upon the adoption of a resolution by the common council, the proper remedy is for the common council to cause a *nunc pro tunc* entry of the yeas and nays to be made.

From the Cass Circuit Court.

*D. C. Justice*, for appellant.

*F. S. Crockett*, for appellee.

**PERKINS, J.**—This was an action by the appellee, Crockett, against the appellant, for salary as city attorney.

The complaint was in two paragraphs, and charged that the plaintiff was elected city attorney of the city of Logansport, on the 1st day of June, 1872, to serve for one year; that he qualified by taking the required oath and filing his bond, which was approved; that the common council fixed

64	319
124	88
64	319
143	166
143	198
64	319
148	92
64	319
181	287
64	319
165	269

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his salary at five hundred dollars per year ; and that he had performed all the duties of the office, and had made demand, etc. The complaint contains, as exhibits, the action of the common council in electing the plaintiff and fixing his salary.

The defendant answered in three paragraphs :

1. The general denial ;

2. Payment ; and,

3. That, on the 16th day of January, 1873, the city council of Logansport removed said appellee from the office of city attorney, for the reason that his services as such were no longer required by the city.

Reply in denial ; and, in an affirmative paragraph, averring that the proceedings of the council, by which they assumed that the appellee was removed, were illegal and void.

Trial by the court ; finding for the plaintiff ; motion for a new trial ; overruled ; and judgment on the finding.

The errors assigned are :

1. The complaint did not state a cause of action ;

2. The first paragraph of complaint did not state a cause of action ;

3. The second paragraph of complaint did not state a cause of action ;

4. The court erred in overruling the motion for a new trial ;

5. In overruling the demurrer to the first paragraph of complaint ; and,

6. In overruling the demurrer to the second paragraph of the reply.

We proceed to consider the assignments of error :

The complaint was sufficient. *Green v. The City of Indianapolis*, 22 Ind. 192 ; *The City of Huntington v. Pease*, 56 Ind. 305.

The causes assigned for a new trial were the following :

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1. Error of law occurring at the trial, in this, to wit, refusing to allow the defendant to prove, by parol, that the common council adopted the first resolution set out in the defendant's answer, by a vote of five members in the affirmative and four in the negative, and that, by mistake of the clerk, a record of the vote was not made. An exception was reserved.

2. Excessive damages; and,

3. Finding contrary to law, and unsustained by the evidence.

The error of law, above mentioned as occurring at the trial, is thus stated in the bill of exceptions:

"Upon the trial of the cause, the defendant introduced in evidence the following record of the common council:

" ' COUNCIL CHAMBER, CITY OF LOGANSPORT, }  
 " ' Thursday Evening, Jan. 16th, 1876. }

" ' Adjourned session, Mayor Hall presiding. Members present, Messrs. Randall, Dykeman, Wilson, Gorman, Grusenmeyer, Justice, Crampton, Thompson and Leonard.

" ' The minutes of the last two meetings were read and approved.

" ' Mr. Dykeman offered the following:

" ' "WHEREAS, it has been necessary for the city to employ other counsel, otherwise than the regularly appointed city attorney, to attend to important litigation in which the city is engaged, thus incurring quite an additional expense; therefore, to curtail expenses in this department, be it

" ' "Resolved, That the services of Frank Crockett, lately appointed city attorney, be in the future dispensed with, and his pay cease as such from this date."

" ' Carried.'

"And the city then offered to prove, by a witness present and sworn, Mr. Dykeman, that, of the nine members present:

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at the meeting, five of them, to wit, Randall, Dykeman, Wilson, Gorman and Grusenmeyer, voted *aye* upon the resolution, and but four members voted *no*; and the mayor declared it carried, but the court, upon objection made, refused to hear the proof."

The act of 1867, for the incorporation of cities, contains this section:

"Sec. 78. All by-laws and ordinances shall, within a reasonable time after their passage, be recorded in a book kept for that purpose, and shall be signed by the presiding officer of the city, and attested by the clerk. On the passage or adoption of any by-laws, ordinances, or resolutions, the ayes and nays shall be taken and entered on the record." 1 R. S. 1876, p. 309.

We consider the grounds alleged for a new trial.

It is decided, in *The City of Madison v. Korbly*, 32 Ind. 74, that, under the 8th section of the act for the incorporation of cities, *supra*, the common council may remove from office a city attorney, by a vote of a mere majority, while, if the removal be made on charges preferred under section 88 of said act, it must be by a two-thirds vote. Perhaps such removal might be on motion, without a resolution. But, in the case at bar, the removal was attempted by resolution, so that, if section 78 of the act for the incorporation of cities, above quoted is mandatory, not directory simply, it was necessary that the ayes and nays should be taken and entered of record on its adoption.

The decisions of courts are not uniform as to the character of such provisions in city charters, but the later, and as we think the better, doctrine is, that they are mandatory. In *Morrison v. City of Lawrence*, 98 Mass. 219, it appeared that power was conferred upon the city to appropriate money to celebrate a holiday, by a "vote of two-thirds of the members of each branch of the city council present and voting by yea and nay vote."

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In the opinion of the court by BIGELOW, C. J., it is said: "There was no competent evidence at the trial of this case that the city of Lawrence had duly exercised any authority under this statute for the celebration of the Fourth of July, when the plaintiff was injured; or that any one was duly empowered to purchase fireworks in behalf of the city to be used in such celebration: The only competent evidence of any such authority is to be found in the record of the proceedings of the city council kept according to the provisions of law. By the act establishing the city of Lawrence, \* \* it is expressly provided that each board composing the city council shall keep a record of its own proceedings, and that a city clerk shall be chosen who shall be the clerk of the board of aldermen. Parol evidence was inadmissible to prove any acts or proceedings of the city council, or that the record of such proceedings as kept by the clerk was erroneous or defective. *Mayhew v. District of Gay Head*, 13 Allen, 129, 134, and cases cited. There was therefore no legal evidence whatever offered by the plaintiff that the defendants had purchased any fireworks, or had authorized any person to use them."

In *Steckert v. The City of East Saginaw*, 22 Mich. 104, it was decided that the charter of East Saginaw, which required that the vote of a city council, in certain cases, should be entered at large in their minutes, was designed to accomplish an important public purpose; it could not be regarded as immaterial, nor its observance be dispensed with. That the record of a vote that it "was adopted unanimously on call," the names of those voting no otherwise appearing than by the statement of those present at the opening of the session, was not a compliance with the statute; that neither the spirit nor the purpose of the act could be satisfied without entries on the minutes, showing who voted on each resolution embraced within the terms of the act, and how



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the vote of each was cast; in other words, the ayes and noes on each resolution must be entered at large on the minutes. See *The City of Delphi v. Evans*, 36 Ind. 90; *Musselman v. Manly*, 42 Ind. 462.

In *Langsdale v. Bonton*, 12 Ind. 467, it is said, that, "Where it is not in conflict with some provision of the charter, the acts of the directors of a corporation, if not recorded, may be proved by parol. Redf. on Railw. 21; *Ross v. The City of Madison*, 1 Ind. 281; *Angell & Ames Corp.* 270." 1 Dillon Munic. Corp. 352.

In Indiana we have no corporations by prescription. Formerly, they were created by, or erected under, special charters. Now, our constitution provides, that "Corporations other than banking shall not be created by special act, but may be formed under general laws." Art. 11, sec. 13, 1 R. S. 1876, p. 42. And their powers are given by statute. 1 R. S. 1876, p. 370, sec. 2. And the manner of exercising them may be prescribed thereby; and, just so far as the statute does thus prescribe, it must be observed.

Our present act for the incorporation of cities does prescribe the manner, at least to a given extent, of passing resolutions, etc. See the section above quoted. And it was not observed in the passage of the resolution in question in this case. The statute requiring votes to be taken by ayes and noes, and a record to be made of the proceedings of the council, is mandatory.

The court did not err in rejecting parol evidence of them. Proceedings of public bodies, required to be recorded, must, as a general rule, be proved by the record. Our statute, 2 R. S. 1876, p. 150, sec. 284, enacts, that,—

"The acts and proceedings of corporations may be proved by a sworn copy of the record of such acts and proceedings; the oath shall be made by the person having the legal custody of such records and shall state that such

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transcript is a true and full copy of the original, and that such original has remained unaltered from its date, to the best of deponent's knowledge and belief. Such sworn copies shall be received as evidence in all cases in which the original would be evidence."

In *Green v. The City of Indianapolis*, 25 Ind. 490, it was decided, touching the above provisions of the statute, that it "was not intended to make such copy the only legal evidence of such acts. The original record is the best evidence, and is always admissible in evidence." *Vawter v. Franklin College*, 53 Ind. 88.

But, in the case at bar, the clerk had omitted to record, and, of course, there was no record to be given in evidence or to be copied. But this state of facts did not necessitate a failure of justice or a resort to parol proof. The common law pointed out the proper remedy; and perhaps it is not yet too late for the city to avail herself of it. A *nunc pro tunc* entry of the omitted proceedings might have been, perhaps may yet be, made. See the numerous cases collected in 1 Dillon Munic. Corp., chap. 11, sec. 231, *et seq.* *McCormick v. Bay City*, 23 Mich. 457, is cited by the counsel for the city, but the charter of the city, in question in that case, did not require votes to be taken by yeas and nays.

The second reason assigned in the motion for a new trial was excessive damages.

We think this assignment was valid, and that, upon it, a new trial should have been granted. There was no proof of the value of the services for which the judgment was recovered. The copy of what was claimed to be a resolution of the council, fixing the salary of the city attorney, was given in evidence, but it was not followed by record evidence tending to show that it was legally adopted. Without such proof, the resolution was but waste paper. It tends to prove nothing. The case of *Morrison v. The City*

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 Kelly v. The State.
 

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of *Lawrence, supra*, is directly in point. We proceed no further.

The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

Petition for a rehearing overruled at May Term, 1879.

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 KELLY v. THE STATE.

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137	346

CRIMINAL LAW.—*Weight of Evidence*—The Supreme Court, on appeal, will not disturb a verdict on the mere weight of evidence.

From the Fountain Circuit Court.

*W. A. Tipton* and *F. S. Wood*, for appellant.

*T. W. Woollen*, Attorney General, *A. P. Harrell*, Prosecuting Attorney, *T. L. Stilwell*, *H. H. Dochterman* and *G. Mc Williams*, for the State.

NIBLACK, J.—Frank Kelly, the appellant, was indicted in the court below for the murder of Thomas Mimms. He was found guilty of manslaughter and sentenced to imprisonment in the state-prison for the term of five years.

After the return of the verdict, the appellant interposed a motion for a new trial, assigning as a cause, amongst other things, the insufficiency of the evidence to sustain the verdict, but his motion was overruled. Error is assigned here upon the overruling of that motion. The only objection urged by the appellant to the proceedings below is the alleged insufficiency of the evidence to sustain the verdict.

The appellant, who testified upon the trial as a witness in his own behalf, admitted the killing of the deceased, but stated facts tending to show that the killing was in

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self-defence. The only important question upon the trial was whether the appellant had been guilty of a crime, in taking the life of the deceased. As bearing upon that question, the evidence was sharply and irreconcilably conflicting.

There was evidence on the part of the State tending to sustain, and, if believed by the jury, sufficient to sustain the verdict. There was evidence on the part of the appellant tending to make out, and, if believed by the jury, sufficient to make out, a case of killing in self-defence.

Under such circumstances, it was the peculiar province of the jury to determine the relative credibility of the witnesses, and to judge of the weight of the evidence.

The jury having passed upon the evidence in this case, and the court below, which heard the evidence, having refused to set aside their verdict, we can not, under the well established rules of practice in this court, reverse the judgment upon the apparent weight of the evidence merely. *Foster v. The State*, 59 Ind. 481; *Cox v. The State*, 49 Ind. 568.

We see no sufficient reason for the reversal of the judgment.

The judgment is affirmed, at the costs of the appellant.

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DUNGAN ET AL. v. DOLLMAN.

**MECHANIC'S LIEN.**—*Purchaser of Part of Property.—Joint Action Against Grantor and Grantee.—Application of Payment.—Special Finding.*—In an action to enforce separate mechanic's liens, upon several tracts of real estate, for separate buildings thereon, against the owner of the same at the

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time such buildings were erected, and a purchaser of one of the tracts subsequent to the filing of the notices of the liens, the court found specially, on the trial, that certain sums had been paid on each lien respectively, and that a certain other sum, exceeding the amount yet due on the purchaser's tract, had been paid "without specifying" that "any particular amount" should be applied "on either of said houses."

*Held*, that, as a conclusion of law, such payment should be applied first to the discharge of the lien on such purchaser's tract.

From the Marion Superior Court.

*F. H. Levering, C. Ballenger and D. M. Bradbury*, for appellants.

*G. Carter and J. N. Binford*, for appellee.

Howk, C. J.—This was a suit by the appellee, against the appellants, to collect the amount due the appellee for work done and materials furnished by him in the erection of a certain house, and for the enforcement of a mechanic's lien thereon.

The appellee's complaint contained three paragraphs, but, as the errors assigned by the appellants do not question the sufficiency of either of the paragraphs, we need not set them out in this opinion. It was agreed in open court, at special term, that "All legal and equitable defenses herein may be introduced under the general denial."

The cause was submitted to the court for trial, without a jury, and, at the request of the defendants, the court, at special term, made a special finding of facts, and of its conclusions of law thereon, in writing, in substance as follows:

"The court, at the request of the defendants, makes a special finding in said cause:

"1. The two houses, mentioned in the complaint, were built under a contract between the plaintiff and the defendant John W. Chambers, at \$8,000.00 each, as in plaintiff's complaint alleged. The two houses were completed about the same time, and required about the same amount, character and value of labor and materials;

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*Dungan et al. v. Dollman.*

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"2. That the notices of plaintiff, of his intention to hold mechanics' liens on the real estate described therein, were recorded in the mechanic's lien record of Marion county, Indiana, within sixty days after the completion of the work;

"3. That the house of defendant Dungan is erected on lots 59 and 60, in John W. Chambers' subdivision of lots 7, 8, 9, 10 and 11, in Irvington, Marion county, Indiana, and that the said subdivision was the first, in point of time, that the said Chambers made in Irvington, and that said lots 59 and 60 are the identical lots mentioned in said notices;

"4. That said Chambers has no subdivision, known or recorded as 'Chambers' First Subdivision,' in Irvington;

"5. That the two notices of mechanic's lien, filed with the complaint, were recorded at the same date, and that there was then due the plaintiff from the defendant Chambers, on the said contract, for work done and materials furnished to said houses, a balance of \$781.70;

"6. That, of the payments made on said contract before the commencement of this suit, \$2,226.63 had been applied by mutual agreement of the plaintiff and defendant Chambers, on the house of defendant Dungan, and \$1,353.37 had in like manner been applied on the other house embraced in the contract, and the sum of \$1,638.30 had been paid on the two houses generally, without specifying any particular amount on either of said houses;

"7. That the title of the two houses was in defendant Chambers, at or near the date of the completion of the work by plaintiff, and that the said lots 59 and 60, in John W. Chambers' subdivision of lots 7, 8, 9, 10 and 11, in Irvington, were then purchased by the defendant Dungan, without any actual knowledge of the claim of plaintiff against them, but after the plaintiff had filed and pro-

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cured to be recorded his notices of intention to hold said liens;

"8. That the title of the property, described in the other mechanic's lien filed in said cause, to wit, lots 72, 73, 74, 75, 76 and 77, in Chambers, Miller and Keaton's Addition to Irvington, Marion county, Indiana, remained in the said Chambers, after the purchase of the property of these defendants by them;

"9. That the sum of \$20.00 was allowed for damages, and credited on the amount found to be due and held as a lien on the property of the defendant Dungan, on account of the settling of the house erected by plaintiff.

"And the court, upon the foregoing facts, finds, as a conclusion of law, that the plaintiff recover of the defendant Chambers \$781.70, and that he is entitled to his mechanic's liens; that they be foreclosed against the property of these defendants Dungs, and the said sum be divided equally between the two pieces of property embraced in the contract, to wit, \$390.85 on each, there being a credit of \$20.00 on account of the settling of the Dungs' house, the decree, as against said house, will be but \$370.85, to wit, \$370.85 against lots 59 and 60, in John W. Chambers' subdivision of lots 7, 8, 9, 10 and 11, in Irvington, Marion county, Indiana, and against lots 76 and 77 in Chambers, Miller and Keaton's Addition to Irvington, Marion county, Indiana, the sum of \$390.85, and decree ordered accordingly."

To the conclusion of law of the court, at special term, the appellants, William H. and Sarah Dungan, at the time excepted. The same appellants, Dungan and his wife, moved the court in writing for a new trial, which motion was overruled by the court, at special term, and to this ruling the same appellants excepted. The court, at special term, then rendered judgment upon and in accordance with its special finding of facts and its conclusion of law

thereon, from which judgment the said William H. Dungan appealed to the court below, in general term. The judgment of the special term was affirmed by the court in general term, and from this judgment of affirmance the appellant William H. Dungan has appealed to this court, and has here assigned, as error, the said judgment of affirmance of the court in general term.

This assignment of error brings before this court, for its consideration and decision, the several questions, and no others, which fairly arise under the errors assigned by the appellant William H. Dungan, in the court below, in general term. The errors there assigned by the appellant William H. Dungan were as follows :

- " 1st. That the court erred in its conclusions of law ;
- " 2d. The court erred in assessing the amount of damages against the real estate of this defendant ; and,
- " 3d. The court erred in sustaining the mechanic's lien on the real estate of this defendant."

It seems to us that upon the facts found by the court, at special term, its conclusion of law is erroneous, and can not be sustained. The leading and controlling facts found by the court may be briefly stated as follows : The appellee built, under a contract with defendant Chambers, two houses at three thousand dollars each, situate on different lots in and near Irvington, which two houses were completed about the same time, and required about the same amount, character and value of labor and materials. Two notices of appellee's intention to hold a mechanic's lien on the lots therein respectively described were filed and recorded on the same day, and within sixty days after the completion of the houses, in the proper record of the proper recorder's office. The title of the two houses was in Chambers, at or near the time they were completed by the appellee ; and the lots 59 and 60 were then purchased by the appellant, without actual knowledge of the appellee's



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claim against them, but after the filing and record of his notices of mechanic's liens thereon. The title to the other lots and house remained in the defendant Chambers, after the appellant's purchase of his house and lots. Of the payments made by Chambers to the appellee, under their contract, by mutual agreement the sum of two thousand two hundred and twenty-six dollars and sixty-three cents was applied on the appellant's house, and one thousand three hundred and fifty-three dollars and thirty-seven cents was in like manner applied on the other house; and the sum of one thousand six hundred and thirty-eight dollars and thirty cents was paid generally "without specifying any particular amount on either of said houses." These payments left a balance, due under the contract, of seven hundred and eighty-one dollars and seventy cents, which was the debt of the defendant Chambers to the appellee.

These were the facts found by the court from which its conclusion of law was drawn. In this conclusion we think the court erred in its application or appropriation of the general payment, made by Chambers to the appellee, of one thousand six hundred and thirty-eight dollars and thirty cents. If this payment had been applied by the court in equal portions on the two houses, as it seems to us it ought to have been applied, it will be readily seen that the contract price of the appellant's house would have been fully paid, and the balance due the appellee from Chambers would have been placed where in equity and good conscience, under the facts found, it ought to have been placed—upon the house and lots, the title of which remained in Chambers. The general rule in regard to the application of payments seems to be well established, that the payor or debtor owing two or more debts to the same creditor or payee, may direct the application of any payment made, as he may elect, to either of his said debts. It is not absolutely necessary in such a case, that the appro-

priation of the payment should be made by an express declaration of the debtor; for if his purpose and intention, as to the application of the payment, could be clearly gathered from the attendant circumstances, the creditor would be bound thereby, even in the absence of an express direction. *The Adams Express Co. v. Black*, 62 Ind. 128.

The general rules governing the appropriation of a payment, where the creditor has distinct accounts against the debtor, are thus stated in 2 Parsons on Contracts, 629: "First, a debtor who owes his creditor money on distinct accounts, may direct his payments to be applied to either, as he pleases. Second, if the debtor makes no appropriation, the creditor may apply the money as he pleases. Third, if neither party makes a specific appropriation of the money, the law will appropriate it as the justice and equity of the case may require." *Cremer v. Higginson*, 1 Mason, 323, 338.

It would seem in the case now before us, from the special finding of the court, at special term, that neither the appellee nor the defendant Chambers made a specific appropriation of the general payment of one thousand six hundred and thirty-eight dollars and thirty cents, on either of the said two houses. It is very clear, we think, that the justice and equity of this case required that the general payment made should have been appropriated first to the payment of the unpaid balance on the appellant's house. This application of the general payment was fully warranted and authorized, we think, by the facts found by the court and the law applicable thereto; and it would have left the balance found by the court to be due the appellee from Chambers, on the other house and lots, the title of which remained in said Chambers. The error of the court at special term, in its conclusion of law upon the facts found, as it seems to us, is this: Instead of finding, as its conclusion of law, upon the facts found, that the bal-

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 McMAHON v. Flanders.
 

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ance of seven hundred and eighty-one dollars and seventy cents, due the appellee from the defendant Chambers, should be equally divided between the two houses, and that the one-half of said balance should be enforced against each house and the lots on which the house was situate, the court should have found, as its conclusion of law, that the entire amount of said balance was due the appellee from Chambers on, and should be enforced against, the house and the lots on which the same was situate, the title of which remained in said Chambers; and that there was nothing whatever due the appellee on the house and lots owned by the appellant.

The judgment is reversed, at the costs of the appellee, as against the appellant Dungan, and the cause is remanded with instructions to the court, at general term, to reverse the judgment at special term, with instructions to modify its conclusion of law, upon the facts found, in accordance with this opinion, and render judgment accordingly, in favor of the appellant William H. Dungan.

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 McMAHON v. FLANDERS.

**INSTRUCTION TO JURY.**—*Reference to Facts not in Evidence.*—On the trial of an action on account for services rendered, wherein the evidence incidentally disclosed that the parties were related, the court instructed the jury, that, if they believed "from the evidence, that the plaintiff" was "the son-in-law of the defendant, and went into the service of the defendant with the understanding that he was to charge nothing for his services, but was to look to the amount his wife was to receive from the estate of her father, then the plaintiff can not recover."

*Held*, there being no evidence of such an understanding, that the instruction was erroneous, and was prejudicial to the plaintiff.

From the Madison Circuit Court.

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141	122
141	691
143	466
64	334
144	470

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*McMahon v. Flanders.*

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*A. F. Shirts, T. J. Kane and T. P. Davis*, for appellant.  
*W. R. Pierse*, for appellee.

PERKINS, J.—McMahon sued Flanders on a complaint containing what were the common counts at common law. He claimed judgment for fifteen thousand dollars.

Answer by the defendant in three paragraphs :

1. General denial ;
2. Set-off, claiming judgment for five thousand dollars, the balance of accounts, as he claimed, in his favor ; and,
3. Payment.

Reply in denial of the second and third paragraphs of answer.

• Trial by jury; verdict for the defendant in the sum of one dollar; motion for a new trial overruled; and judgment on the verdict.

The assignment of error is, that the court erred in overruling the motion for a new trial. The grounds therefor stated in the motion were,—

1. Verdict contrary to law, and unsustained by evidence;
2. Error of law occurring at the trial, in permitting the defendant to cross-examine the plaintiff, in his examination in chief, upon the items set out in his bill of particulars, filed with the complaint, as credits to the defendant;
3. Error of law in permitting the defendant to prove by Thomas J. Reed, J. W. Finley and others, the value of services of four hands and stock-buyers other than the plaintiff, in the vicinity of Strawtown, Hamilton county, Indiana;
4. Error in giving to the jury instructions numbered 1, 2 and 3; and,
5. Surprise by the testimony of the defendant Flanders, upon the question of money loaned by John M. McMahon to the defendant Flanders, and also as to his own money,

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McMahon v. Flanders.

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alleged to have been used by the plaintiff for use of the defendant.

We will first consider the fourth assignment of error. The second instruction given by the court to the jury was in these words:

"If the jury believe from the evidence, that the plaintiff is the son-in-law of the defendant, and went into the service of the defendant with the understanding that he was to charge nothing for his services, but was to look to the amount his wife was to receive from the estate of her father, then the plaintiff can not recover for such services, in this action."

The instruction was duly excepted to. The objection to it is, that it was not applicable to the evidence. "It is a well settled rule of law, that the instructions of the court to the jury should be relevant to the issues in the case, and pertinent to the evidence given to the jury."

*Wallace v. Morgan*, 23 Ind. 399.

In the case at bar, we have carefully examined the evidence in the record, and there is not a particle tending to prove that plaintiff "went into the service of the defendant with the understanding that he was to charge nothing for his services," etc., but the fact came out, incidentally, that he was the son-in-law of the defendant.

The instruction, above copied, was not applicable to the evidence, and the error in giving it was not cured by any instruction that was given. If, therefore, it was not harmless to the party objecting to it, the case should be reversed. *Ferguson v. Hosier*, 58 Ind. 438; *Lewellen v. Garrett*, 58 Ind. 442.

In this case, the verdict of the jury was against the plaintiff; and the presumption is, that the instruction complained of contributed to that result. In *Hays v. Hynds*, 28 Ind. 531, it is said by FRAZER, C. J.: "Instructions should be pertinent to the case. Juries are apt to assume and are justified in assuming, that they are applicable."

Jurors do not take the evidence to their consultation rooms, except in their heads. They take the instructions of the court in the same way. But the instructions are given to them after the evidence; and often, as in this case, are in a few short propositions, more easily, and likely to be, remembered than voluminous miscellaneous evidence.

When the jury commenced their deliberations, naturally the instruction of the court touching the fact of the plaintiff's being the son-in-law of the defendant, would be fresh in their recollection; and the fact that the same instruction told them they might, in a certain contingency, find against the plaintiff, as to the claim sued for, might lead them to give an undue prominence to the fact of such relationship, and to conclude against him on that fact alone, or to assume that there was evidence which the court must have recollected, though they might not, that would authorize such conclusion. We think the instruction calculated to confuse and mislead the jury, to the prejudice of the plaintiff, the appellant in this court. *Clem v. The State*, 31 Ind. 480; *Swank v. Nichols*, 24 Ind. 199; *Palmer v. Wright*, 58 Ind. 486.

For the error in giving said instruction, the court should have granted a new trial, and the cause must be reversed. We need not examine, therefore, whether the other grounds alleged for a new trial are valid or otherwise. The cause must be remanded for another trial, on which the same mistakes in rulings, if mistakes they were, may not be repeated.

The judgment is reversed, with costs, and the cause remanded for a new trial, etc.

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Vanness v. Dubois et al.

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## VANNESS v. DUBOIS ET AL.

CONTRACT.—*Dissolution of Copartnership.—Agreement to Pay Partnership Indebtedness.—Action for Breach of.*—A member of a partnership who has sold and delivered to his copartners his interest in the partnership property and choses in action, in consideration of their payment to him of a stipulated sum, and their agreement to pay off the partnership indebtedness, may, if he be compelled to pay off any of such indebtedness, recover the same of them.

SAME.—*Statute of Frauds.—Consideration.*—Such an agreement is not within the statute of frauds, and is upon a valuable consideration.

From the Franklin Circuit Court.

*F. S. Swift and W. H. Bracken*, for appellant.

*F. Berry and H. Berry*, for appellees.

BIDDLE, J.—Complaint by the appellant, against the appellees : —

That, in the years 1870 and 1871, the plaintiff and the defendants were partners in trade, doing business as such in butchering cattle, hogs, sheep, and other animals; that they executed notes to various persons for money borrowed by said firm, and for cattle and stock purchased as aforesaid by them as such partners, including two several notes executed by them jointly as such firm, calling for a great sum of money, to wit, five hundred dollars each; that after they had so been in partnership a long time, to wit, one year, this plaintiff, in consideration that the said defendants would pay him a certain sum, to wit, one hundred dollars, and pay off all notes and indebtedness of said firm, sold out his entire interest in said firm to the defendants, including tools, stock on hand and book accounts, and all profits of said firm, which were at said time of great value, to wit, of the value of one thousand dollars; that the defendants accepted said proposition and received said stock on hand, tools and accounts, and all profits and other indebtedness in favor of said firm, and agreed to pay off said indebtedness of said firm as afore-

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*Vanness v. Dubois et al.*

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said, including all accounts, notes and other obligations against said firm, and paid him said sum, to wit, one hundred dollars, and said firm was then and there and thereby mutually dissolved; that, among other obligations existing against said firm at the time of said sale and transfer by said plaintiff to defendants, and which said defendants agreed to pay off as aforesaid, were two notes of hand, executed by plaintiff and defendants to one Samuel P. Roberts, dated, to wit, June 10th, 1870, both due in ten months, one calling for one hundred dollars, and the other calling for two hundred dollars; that said defendants failed, neglected and refused to pay off said notes, or either of them, but allowed judgment to be rendered against this plaintiff and the defendants on said notes, and the defendants failed, neglected and refused to pay said judgment, or any part thereof; that plaintiff was compelled to pay off a great amount of said judgment, amounting to the sum of three hundred and fifty dollars, which sum is now due to the plaintiff from said defendants. Wherefore he demands judgment for five hundred dollars and other proper relief.

A demurrer, alleging the insufficiency of the facts stated to constitute a cause of action, was sustained to the complaint. Exceptions. The plaintiff stood by his complaint, and the court rendered judgment against him. Appeal.

The sufficiency of the complaint is the only question presented in the case, and wherein it is insufficient we have not been able to ascertain. It counts upon a lawful contract, founded upon a valuable consideration, not within the statute of frauds, and alleges breaches.

The appellees have not favored us with a brief; we do not, therefore, know their views, nor do we know upon what ground the court based its ruling.

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 Agee v. The State.
 

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The complaint, in our view, is well drawn, and sufficient in every particular.

The judgment is reversed, at the costs of the appellees; the cause remanded with instructions to overrule the demurrer to the complaint, and for further proceedings.

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 AGEE v. THE STATE.

**CRIMINAL LAW.—Indictment.—Assault with Intent to Murder.**—An indictment charged, that, on, etc., at, etc., the defendant “did feloniously attempt to commit a violent injury upon” a person named, the defendant “having then and there a present ability” so to do, “by then and there feloniously, purposely and with premeditated malice shooting at and against” such person, with a pistol loaded with gunpowder and leaden balls and then and there in the defendant’s hands, “with intent then and there and thereby” such person “feloniously, purposely and with premeditated malice to kill and murder.”

*Held*, that the indictment is sufficient.

**SAME.—Resisting Arrest on Warrant for Bastardy.—Self-Defence.—Assisting Officer.—Instructions.**—On the trial of the defendant, on such indictment, the evidence of the State was, in effect, that the defendant, in avoiding an arrest for bastardy upon a warrant which he knew was in the hands of the prosecuting witness, who was authorized by the officer to make the arrest, threatened to and did shoot at such witness with a loaded pistol, and there was also evidence tending to show an exchange of shots after the first fire; and the defendant’s evidence was, substantially, that he had no knowledge that the prosecuting witness had the warrant, or any authority to arrest him, and knew he was not an officer, that the defendant shot at the prosecuting witness only upon the latter’s presenting a loaded pistol and threatening to kill him, that there was an exchange of shots, and that he did not intend to kill the prosecuting witness, but shot merely in self-defence.

The defendant asked the court to give to the jury certain instructions relating to the right of self-defence, and denying the right of an officer to kill a person who is fleeing from arrest upon such a warrant.

*Held*, the instructions (which are set out in the opinion in full) properly stating the law, that they ought to have been given.

From the Pike Circuit Court.

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Agee v. The State.

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*J. E. McCullough, C. H. McCarty and — Thompson*, for appellant.

*T. W. Woollen*, Attorney General, and *W. H. Trippet*, Prosecuting Attorney, for the State.

NIBLACK, J.—This was a prosecution for an assault, with the intent to commit murder.

The indictment charged, “that John Agee, on the 18th day of December, A. D. 1877, at,” etc., “did feloniously attempt to commit a violent injury upon the person of Devore C. Houchens, he, the said John Agee, having then and there a present ability to commit said injury, by then and there feloniously, purposely and with premeditated malice, shooting at and against the said Devore C. Houchens with a certain pistol, commonly called a revolver, then and there loaded with gunpowder and leaden balls, which the said John Agee then and there in both his hands had and held, with intent then and there and thereby him, the said Devore C. Houchens, feloniously, purposely and with premeditated malice, to kill and murder.”

A motion to quash the indictment was interposed and overruled.

A jury returned a verdict of guilty as charged in the indictment, and the defendant was fined in the sum of five dollars, and sentenced to imprisonment in the state-prison for the term of two years.

The defendant has appealed to this court, and assigned for error the overruling of his motion to quash the indictment, and the refusal of the court to grant him a new trial.

A similar indictment was before us in the case of *McCulley v. The State*, 62 Ind. 429, and was held to be sufficient as an indictment for an assault with intent to commit murder. Upon the authority of that case, we must hold the indictment now before us to have been good, as an indictment for the same offence.

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Agee v. The State.

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Upon the trial there was evidence on the part of the State tending to show that Theodore Houchens was a constable of his township, and that as such constable he had, a short time before the commission of the offence alleged in the indictment, received a warrant for the arrest of the appellant on a charge of bastardy, which warrant he had placed in the hands of his brother, the prosecuting witness, for service.

Devore C. Houchens, the prosecuting witness, testified, amongst other things, in substance as follows:

"My name is Devore C. Houchens; I know John Agee; I saw him at Sylvester Coleman's; we had been hunting him that day; my brother, Theodore Houchens, had been along with us, but when we started down to Coleman's he went over to Hunt's, about one-fourth or one-half a mile away; he was over there at the time of the shooting. When we got to Coleman's house, I stepped in on the west side and saw Agee go out on the east side; I went through and followed him out on the east side; I told him I had a warrant for him; he kept going on, and told me to keep it; he said life was not worth any thing to him, and, if I valued mine, I had better not crowd on him; he then raised his pistol, and pointed it at me and shot; I insisted upon his giving up; he said he would not; I did not take my pistol out until after he shot; I was about twenty feet from him when he shot; I was going towards him. I had a warrant in my possession then; I had had it three or four days. \* \* \* I was ordered by the constable to assist him that day in the arrest of John Agee."

In most of his material statements the prosecuting witness was more or less corroborated by several other witnesses. There was also evidence on the part of the State tending to show that some shots were mutually exchanged after the first fire.

The defendant testified in his own behalf, amongst other things, as follows:

"My name is John Agee; \* \* \* I am twenty-six years old now. I remember the difficulty in question in this case; I was at Sylvester Coleman's; Devore Houchens came there with Kline McCandless and Hunt; John Hunt came in the house and passed through the house; I stepped out in the back yard; I was climbing over the fence and heard some one say, 'right here I will kill you;' I jumped down off of the fence and turned around and Devore C. Houchens was just in the act of shooting; he had a great big pistol pointed right at me; there was not a word said about his having a writ, before the shooting; when I turned around and saw him with the pistol pointed at me, I shot; I could not tell which shot first; we both shot about the same time; he stepped forward again and shot, and I returned the fire again; he gave me no notice that he was an officer; I knew before, that he was not a constable; I told him I would hate to hurt him. After the shooting was over, I asked them if they had a writ; they read no writ, and showed me none; the revolver I had was a small 22 revolver, the smallest that is made; I was about fifteen steps from him when I shot; I could not take the life of a man that far with it; I did not intend to take his life."

The defendant was slightly corroborated in some of his statements by the testimony of other witnesses.

At the proper time the court instructed the jury very fully as to what had to be proved to sustain the prosecution, and the weight of evidence necessary to authorize a conviction in cases like the one at bar. Also, as to the doubts and presumptions which went in favor of the defendant, but did not instruct them in any respect as to the law governing the right of self-defence.

In addition to those given by the court on its own mo-

tion, the defendant prayed the court to give ten instructions, submitted on his behalf by his counsel. The court gave, substantially, the first six of those instructions, and refused to give the remaining four.

Nos. 7 and 8 of the series, being two of those refused, were as follows:

"7. In determining whether the defendant is guilty at all in this case, you should take into consideration what Devore C. Houchens was doing at the time of the shooting by the defendant, providing you find that the defendant shot at Houchens. You should take into consideration the question of whether or not the defendant at that time believed, and as a reasonable man might believe, that the said Devore C. Houchens was attempting to take the life of the defendant, or do him great bodily harm. There is some evidence before you to the effect that said Houchens was attempting, at that time, to arrest the defendant. Even if the said Houchens had, at that time, a valid warrant for the arrest of the defendant, with full authority to execute that warrant, still the said Houchens would have had no right to shoot the defendant, merely for the purpose of arresting him at a time when the defendant was fleeing, and if the said Houchens had shot the defendant and killed him, merely for the purpose of preventing the defendant from fleeing and escaping an arrest, the said Houchens would have been guilty of murder. And hence, if you should find from the evidence, that, at a time when the defendant was fleeing, the said Houchens attempted to take the life of the defendant, or to do him great bodily harm, by shooting at him with a dangerous and deadly weapon, then the defendant would have had the right to repel such an attack with force. If the defendant, under such circumstances, used no more force than was reasonably necessary to repel such an attack, the defendant would be excusable for such force used by him, and should not be convicted therefor of any degree of offence.

"8. The theory of self-defence is, that the party assailed may repel force by force. When a party's life is in danger, or he is in danger of some great bodily harm, or when, from the acts of the assailant, he believes, and has reasonable grounds to believe, that he is in danger of losing his life, or receiving great bodily harm from his assailant, the right to defend himself from such danger or apprehension may be exercised by him, and he may use it to any extent which is reasonably necessary. And even if death of the assailant result from such reasonable defence, the party so defending himself is excusable."

These instructions impress us as having been somewhat hastily prepared, and perhaps might be improved upon a careful revision, but we think, that, so far as they went, they gave a substantially correct statement of the law of self-defence, as applicable to the testimony of the defendant, and ought to have been given. *Runyan v. The State*, 57 Ind. 80.

We do not set out instructions numbered 9 and 10, refused as above. as they are mainly but repetitions in other forms of portions of instructions numbered 7 and 8, above quoted.

As the court gave no other equivalent instructions, or any other instruction bearing upon the same general subject, we are constrained to hold that it erred in refusing to give instructions numbered 7 and 8, above set forth.

The judgment is reversed, and the cause remanded for a new trial.

The clerk will give the proper notice for the return of the prisoner.

RYAN ET AL. V. CURRAN ET AL.

NEGLIGENCE.—*Erection of Building by Contractor.—Excavation in Sidewalk of City.—Injury of Passer-By.—Owner not Liable for Contractor's Negli-*

64	345
124	390
64	345
131	368
64	345
151	68

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Ryan *et al.* v. Curran *et al.*

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*gence.—Nuisance per se.—Case Overruled.—Copy.—Exhibit.—Pleading.—*

In an action against the owner of a certain lot, fronting upon a sidewalk of a public street, in a city, and one who had contracted with him to erect a building thereon, to recover damages for a physical injury received by the plaintiff through the alleged negligence of the defendants in leaving open an excavation made by them in the ground theretofore covered by the sidewalk, wherein the complaint alleged that the excavation was made in the course of the erection of such building, and that the defendants had negligently covered a part of the excavation in such manner as to constitute a continuation of the sidewalk, but had left open the other part, into which the plaintiff, without fault, had fallen, while passing along such sidewalk in the night-time, the owner answered admitting the injury received by the plaintiff, but alleging that such lot and its appurtenances, at the time of the injury, were in the exclusive possession of the contractor, a skilful, reliable and competent builder, pursuant to a written contract between them for the erection of such building, and that, at that time, neither the owner, nor any agent, servant or person in his employ or under his control, had any charge, management or control of the premises, and that the acts charged as the cause of the injury were not the acts of either the owner, his agents, servants or employees.

*Held*, on demurrer, that the answer is sufficient. *Silvers v. Nerdlinger*, 30 Ind. 53, overruled in part.

*Held*, also, that a copy of such contract, attached to the answer as an exhibit, forms no part thereof.

*Held*, also, that, unless the work contracted for is a nuisance *per se*, the owner is not liable for the negligence of the contractor.

From the Marion Superior Court.

*D. Turpie and H. D. Pierce*, for appellants.

*J. W. Gordon, R. N. Lamb, S. M. Shepard, A. G. Porter, W. P. Fishback and G. T. Porter*, for appellees.

Howk, C. J.—This was an action by the appellee Barbara Curran, as plaintiff, against the appellants, James B. Ryan, Elijah Victor and Stephen Knowlton, and her co-appellees, Deloss Root, Jerome B. Root, Frederick Nolke, Frank Smallwood and Frank Windesheimer, as defendants, in the court below.

In her complaint the appellee Barbara Curran alleged, in substance, that on or about the 1st day of September, 1874, the appellant James B. Ryan was the owner, and in

the possession and control, of a lot of ground and its appurtenances at the north-west corner of Tennessee street and Indiana avenue, in the city of Indianapolis, in Marion county, Indiana, and was building and erecting a block of houses thereon fronting on and along both said street and avenue, and was about finishing and completing the said block; that, in the excavation for the cellar of said block, on said avenue, and for the entrance to said cellar and for other purposes, the appellants had digged down and excavated said Indiana avenue and the north sidewalk thereof, to the depth of, to wit, fifteen feet, on the outside of the cellar wall of said block, fronting said avenue, and had erected another wall in said sidewalk, at a distance of, to wit, five feet from, and parallel to, said cellar wall, and had then and there, by means of iron grating or bars, covered up a part of the space between the wall of said block and the said wall south thereof, at a level with said sidewalk, and so as to constitute a part of the same; that after having thus covered up a part of the space and excavation between the said walls, the defendants carelessly, negligently, wrongfully and unjustly left the rest of said space and excavation, between the said walls open, and failed and neglected to place any railing or guards around such open space, but carelessly and negligently left the same open and unguarded in said sidewalk and on a level therewith, so as to leave a very deep, abrupt and dangerous chasm in said sidewalk, to the great danger of the lives and limbs of all the good citizens of said city and State walking and going on and over said Indiana avenue and said sidewalk, on the north side thereof; that, on the day and year aforesaid, in the night-time of said day, the appellee Barbara Curran was walking upon and along said sidewalk of said avenue, and upon said iron bars which then and there constituted a part of said sidewalk, when, owing to the aforesaid negligence, carelessness



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and wrongful omission and acts of the defendants, she was precipitated, without fault or negligence on her part, from said iron railing or bars placed as aforesaid by said defendants, into the said excavation and space between the said walls, and fell from the level of said sidewalk to the depth of said excavation, falling and striking on the bottom thereof with great force and violence, by means whereof she was greatly injured, and was sick and sore for a long time, and suffered greatly, etc., and paid out, to wit, five hundred dollars for medical and surgical treatment, and suffered damages in the sum of five thousand dollars, for which she prayed judgment, and for other proper relief.

To this complaint the appellant James B. Ryan separately answered in two paragraphs, the first being a general denial, and the second setting up affirmative matter.

To the second paragraph of said answer, the appellee Barbara Curran demurred, upon the ground that it did not state facts sufficient to constitute a defence to her action, which demurrer was sustained by the court, and to this decision the appellant Ryan excepted.

The appellants Victor and Knowlton jointly answered in two paragraphs: first, a general denial; and, second, a special defence. To the second paragraph of this answer, the appellee Barbara Curran replied by a general denial.

The defendants Deloss and Jerome B. Root jointly answered the complaint by a general denial thereof.

The appellants Nolke, Smallwood and Windesheimer jointly answered by a general denial of the complaint.

The issues joined were tried by a jury in the court below at special term, and a verdict was returned for the appellee Barbara Curran, assessing her damages at four thousand dollars against the appellants Ryan, Victor and Knowlton, and finding for the other defendants, Deloss Root, Jerome B. Root, Nolke, Smallwood and Windesheimer.

The appellant Ryan separately, and the appellants Victor and Knowlton jointly, moved the court at special term for a new trial of this cause, which motions were severally overruled, and to these rulings they respectively excepted. The court at special term rendered judgment on the verdict, from which judgment the appellants appealed to the court below in general term. In this latter court, the judgment of the special term was affirmed, and from this judgment of affirmance this appeal is now here prosecuted.

In this court the appellants have assigned, as error, the judgment of the court below in general term, affirming the judgment of said court at special term. This alleged error brings before this court the questions which fairly arise under the errors assigned by the appellants in the court below in general term, which errors were as follows :

1. The decision of the court at special term, in sustaining the demurrer of the appellee Barbara Curran to the second paragraph of the separate answer of the appellant James B. Ryan ; and,

2. The decision of said court at special term, in overruling the motion of the appellant Ryan for a new trial.

The appellant James B. Ryan, in the second paragraph of his separate answer, alleged, in substance, that he admitted he was the owner of the lot of ground described in the complaint, and the fact that the appellee Barbara Curran was injured by falling into the cellar of the building then being erected thereon ; but the appellant Ryan averred that the appellants Victor and Knowlton, skilful, reliable and competent builders, were engaged in the erection of a brick building on said lot, having been contracted with by the appellant Ryan ; that the said builders and contractors were to have, and did have and exercise, exclusive control and direction of the digging of the cellar, the erection of the walls therein and around the same, together with the passage-ways into the same, and the erection of the entire

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building, to its completion; and the appellant Ryan averred that neither he, nor any agent, servant or person in his employ or under his direction or control, had any charge or management or control thereof; and that the acts, deeds, matters and things, alleged to have been the cause of the injury and damage of the appellee Barbara Curran, were in no respect the acts of the appellant Ryan, nor of his servants or agents, nor of any person in his employ; and that said work was done under a special contract in writing with the appellants Victor and Knowlton, which said contract was filed with said paragraph of answer, marked "exhibit A."

The first question presented for our consideration and decision, by the record of this cause and the error assigned thereon, may be thus stated:

Were the facts alleged in the second paragraph of the separate answer of the appellant James B. Ryan sufficient to constitute a complete defence, in his behalf, to the action of the appellee Barbara Curran?

It seems very clear to us, that this question must be answered in the affirmative. We are aware that this conclusion is apparently in conflict with the opinion of this court in the case of *Silvers v. Nerdlinger*, 30 Ind. 53. In that case it appears from the opinion of the court, that Nerdlinger and another owned a lot in the city of Fort Wayne, on which lot the appellant Silvers had contracted with the appellees to erect for them a building, and to that end they had delivered to him the exclusive possession of said lot. During the erection and before the completion of the building, one Charles Dwelly, in passing over the sidewalk in front of said building,—in which sidewalk an excavation had been made for the construction of the walls and cellar-ways of the building, and had been left in an unguarded condition,—had fallen into the pit, and had been injured thereby. In an action for that purpose, Dwelly had recovered dam-

ages for the injuries he sustained, from the appellees, the owners of the lot, which damages they had paid. The appellees, the owners of the lot, then brought an action against the appellant, the contractor for the building, to recover from him the damages they had paid Dwelly, and they obtained judgment therefor in the circuit court. From this judgment Silvers, the contractor for the building, appealed to this court, and this is the case reported in 30 Ind. 53, *supra*.

It will be seen, from this statement of the case cited, that the point in judgment in that case was the right of the owners of the lot to recover from the contractor the damages, which they had been compelled to pay by reason or on account of the alleged negligence of the contractor. This is not, but is widely different from, the question presented for decision by the second paragraph of the separate answer of the appellant Ryan, in the case at bar. The question here presented is, whether or not the appellant Ryan, as the owner of the lot, under the facts stated in the second paragraph of his answer, was liable in damages to the appellee Barbara Curran, for the injuries received by her in the manner stated in her complaint. The liability of the owner of the lot to the party injured, in such a case, was not the question before the court in the case of *Silvers v. Nerdlinger, supra*; but ELLIOTT, J., devoted much of his opinion, in the decision of that case, to the consideration of that question. The opinions of that learned judge on any legal question are entitled to very high respect; but his opinion in the case cited, upon the question now under consideration, which was not involved in that case, can not be regarded as an authority decisive of that question.

The contract in writing between the appellant Ryan and his co-appellants, Victor and Knowlton, which was filed with the second paragraph of Ryan's separate answer, was

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not the foundation of the defence stated in said paragraph. Therefore the written contract, which can only be regarded as evidence tending to sustain the averments of the paragraph, did not become a part of the paragraph by being filed therewith, and can not be considered in determining the sufficiency of the facts stated therein to constitute a defence to the action. *The Excelsior Draining Co. v. Brown*, 38 Ind. 384; *Trueblood v. Hollingsworth*, 48 Ind. 537; *Wilson v. Vance*, 55 Ind. 584; and *Schori v. Stephens*, 62 Ind. 441.

Before considering the sufficiency of the facts alleged in the second paragraph of Ryan's answer, we may properly premise that it is evident from the averments of the complaint, that the appellee Barbara Curran did not ground her alleged cause of action against Ryan solely upon the fact of his ownership of the lot described in her complaint. The gist of her cause of action, as stated and reiterated in her complaint, was the alleged negligence of Ryan and his codefendants, in covering the area or cellar-way in part, so as apparently to invite travel thereon, and in leaving the residue of the area or cellar-way uncovered and unguarded. It can not be questioned, as it seems to us, that the party, whoever he may have been, who left that area or cellar-way in the condition described in the complaint, in a public thoroughfare of a large city, was guilty of gross negligence and was liable in damages under the averments of the complaint, for the injuries sustained by Barbara Curran. But the question for decision under the allegations of the second paragraph of Ryan's answer, admitted to be true by the demurrer thereto, is this: Can it be said, if the facts alleged are true, that the appellee Barbara Curran received the injuries complained of, by or through the negligence of the appellant James B. Ryan.

If it be true, as alleged in Ryan's answer, that the appellants Victor and Knowlton had and exercised exclusive

control and direction of the digging of the cellar, the erection of the walls therein and around the same, together with the passage-ways into the same, and the erection of the entire building to its completion, can it be correctly said that the appellee Barbara Curran received the injuries complained of, by or through the negligence of Ryan? If it be true, as alleged in Ryan's answer, that neither Ryan, nor any agent, servant or person in his employ or under his direction or control, had any charge or management or control of the digging of the cellar, the erection of the walls therein and around the same, or of the passage-ways into the cellar, or of the erection of the building to its completion, can it be correctly said that the alleged injuries of Barbara Curran were received by her, by or through Ryan's negligence? If it be true, as alleged in Ryan's answer, that the acts, deeds, matters and things alleged by Barbara Curran, in her complaint, to have been the cause of her injury and damage, were in no respect the acts of Ryan, nor of his servants or agents, nor of any person in his employ, can it be said, with any degree of truth or accuracy, that the alleged injuries of Barbara Curran were caused by or resulted from the negligence of Ryan?

It seems very clear to us that each and all of these questions must be answered in the negative. The truth is, and it can not be gainsaid, that the averments of the second paragraph of Ryan's answer constitute a full and complete defence to every fact alleged in the complaint, except the facts of Barbara Curran's injury and Ryan's ownership of the lot and building. It need hardly be said that these excepted facts alone would not give Barbara Curran any cause of action against the appellant Ryan. The gravamen of the complaint in this case was the alleged negligence of the defendants, but the facts alleged in the second paragraph of Ryan's answer show very clearly, we

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think, that the negligence complained of was not Ryan's negligence.

It was alleged, as we have seen, in the second paragraph of Ryan's answer, that the appellants Victor and Knowlton, "skilful, reliable and competent builders," had and exercised exclusive control and direction, under a special contract in writing with the appellant Ryan, over the digging of the cellar, the erection of the walls therein and around the same, together with the passage-ways into the same, and the erection of the entire building to its completion. In such a case it is very clear we think, that the appellants Victor and Knowlton can not be regarded, in any proper sense, as the agents or servants of Ryan, except as to the specific results which they undertook or contracted to produce; and the law is now well settled, that the employer of a builder or contractor, in such a case, is not responsible to third persons for the negligence of the builder or contractor, or for the negligence of the latter's servants, agents or sub-contractors, in the execution of the work. Ryan's contract with Victor & Knowlton, for the erection of his block of buildings, was a lawful contract, for a lawful purpose. The work contracted for was not a nuisance *per se*; and the doctrine is now firmly established, that, unless the work is in itself a nuisance, the owner of the real estate, who has contracted with "skilful, reliable and competent builders," will not be liable to third persons for injuries which result from the negligence of the builders or contractors, or of their servants, agents or sub-contractors, in the execution of the work. *Hilliard v. Richardson*, 3 Gray, 349; *Linton v. Smith*, 8 Gray, 147; *Brackett v. Lubke*, 4 Allen, 138; *Barry v. City of St. Louis*, 17 Mo. 121; *Blake v. Ferris*, 5 N. Y. 48; *Pack v. The Mayor, etc.*, 8 N. Y. 222; *Kelly v. The Mayor, etc.*, 11 N. Y. 432; *Painter v. The Mayor, etc.*, 46 Pa. State, 213; *Allen v. Willard*, 57 Pa. State, 374; *De Forrest*

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v. *Wright*, 2 Mich. 368; *Scammon v. City of Chicago*, 25 Ill. 424; *Pfau v. Williamson*, 63 Ill. 16; *Shearm. & Redf. Negligence*, sec. 79; and *Wharton Negligence*, sec. 818.

The general proposition to be deduced from the authorities cited is, "that one person is not liable for the acts or negligence of another, unless the relation of master and servant exists between them; and when an injury is done by a party exercising an independent employment, the person employing him is not liable."

We are clearly of the opinion, that the matters pleaded by the appellant James B. Ryan, in the second paragraph of his separate answer, were sufficient to constitute a defence to the cause of action stated by the appellee Barbara Curran, in her complaint; and therefore we hold, that the court at special term, erred in sustaining said appellee's demurrer to said second paragraph of answer.

The conclusion we have reached, in regard to the sufficiency of the second paragraph of the separate answer of Ryan, renders it unnecessary for us, so far as he is concerned, to consider the second error assigned by him in the court below, in general term. In this court the appellants Victor and Knowlton appear to have joined with the appellant Ryan in the assignment of errors; but they failed to assign any errors in the court below in general term, and therefore their assignment of errors here presents no question for decision in their behalf. *Wesley v. Milford*, 41 Ind. 418, and *The State, ex rel., etc., v. The Terre Haute, etc., R. R. Co., ante*, p. 297.

In so far as the decision of this cause is in conflict with the case of *Silvers v. Nerdlinger, supra*, the latter case is overruled.

The judgment is affirmed as to the appellants Victor and Knowlton; but as to the appellant James B. Ryan the judgment is reversed, at the costs of the appellees,



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and the cause is remanded with instructions to overrule the demurrer to the second paragraph of Ryan's answer, and for further proceedings in accordance with this opinion.

Petition for a rehearing overruled.

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TAYLOR ET AL. v. TAYLOR.

**GUARANTY.—***Guaranty to Landlord of Tenant's Rent.—Action on.—Answer of Lessee's Death.*—In an action by the lessor's endorsee, against the lessee's guarantor, upon a written lease and guaranty, to recover rent due, it is no defence to answer that the rent sued for accrued after the death of the lessee and during the occupancy of the premises by a third person.

**SAME.—***Unnecessary Reply.*—A paragraph of answer simply denying such guaranty needs no reply, and, if such a reply be filed, there is no error in sustaining a demurrer thereto.

**SAME.—***Proof of Service of Notice.—Sheriff's Return.*—A written notice to such guarantor of the default of the lessee, bearing the official certificate of the sheriff that he had served the same upon the guarantor by copy, is competent evidence of service of the notice.

**SAME.—***Lease.—Demand.—Notice.*—Where, by the terms of such lease, the rent is payable at stated times, in specified instalments, the guarantor, on default of the lessee, is immediately liable, without either notice or demand.

**SAME.—***Judgment Follows Verdict.—Unnecessary Party.—Clerical Error.*—Where, though the complaint states no cause of action against any but the defendant, a third person is permitted, on his own petition, to appear and answer, and a verdict is found against "the defendant," the use of the word "defendants" in the judgment will be treated as a mere clerical error, and the judgment be held as one against the original defendant only.

From the Tippecanoe Circuit Court.

*W. C. Wilson, J. H. Adams and A. Parsons, for appellants.*

*M. Jones and J. L. Miller, for appellee.*

**BIDDLE, J.**—The complaint in this case counts upon a lease executed by Lyman O. Taylor to Barney Spitznagle, for certain premises in the city of Lafayette, known as the

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"Bramble House," with a guaranty executed by Stephen O. Taylor, endorsed upon the lease, covenanting that the lessee would perform all the stipulations in the lease on his part. Spitznagle assigned the lease by endorsement to the appellee. Averments of notice to the guarantor of non-payment, and demand. Breaches assigned. Demurrer by Stephen O. Taylor to the complaint, for want of facts, overruled. Answer, general denial and several special paragraphs, to the fifth of which a demurrer, alleging the want of facts, was filed and sustained. A demurrer to a reply to the fourth paragraph of answer, for want of facts, was overruled. This presents the pleadings between the appellee and the appellant Stephen O. Taylor. Esther L. Taylor was made a party defendant on her own petition, and answered. Trial by jury, and verdict for plaintiff. The appellant Stephen O. Taylor moved for a new trial, one assigned cause for which was the improper admission of evidence. This statement of the case shows the bases of all the questions discussed by the appellant in his brief. Other questions were made in the progress of the case, which are not stated. They were not discussed, and must be held as waived.

The appellant Stephen O. Taylor makes five points in his brief.

1. That the court erred in overruling the demurrer to the complaint:

1st. Because the written guaranty is not made a part of the complaint; and,

2d. Because the complaint contains no averment of a demand upon the guarantor.

We think the appellant is mistaken in both of these questions. The written guaranty is copied into the complaint, and a written notice to the guarantor of the failure of the lessee to pay the rent, and a demand for the rent from the guarantor, are also copied into the complaint.

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There is also a general demand averred. The complaint is abundantly good.

2. That the court erred in sustaining the demurrer to the amended fifth paragraph of answer.

The substance of this paragraph, before it was amended, was, that the lessee died on the 4th day of October, 1875, and the premises were not thereafter occupied by the administrator or other legal representative. In an amendment to this paragraph it is averred, "that, after the death of said lessee, said premises were occupied by Esther L. Taylor and Lyman C. Taylor, Jr., or by one of them, by and with the consent of the plaintiff."

There is no validity in this paragraph. Whether the premises were occupied or not, the lessor, or his assignee, was entitled to the rent, under the law.

3. That the court erred in overruling the demurrer to the second paragraph of reply. This reply was to the fourth paragraph of answer, which was simply a denial of the guaranty, and therefore required no reply. There is no error in this ruling.

4. That the court admitted a written notice to go to the jury as evidence, without proof of its service.

This writing purports to be a notice to the appellant, as guarantor of the default of the lessee in the payment of the rent. A certificate of its service upon the appellant by delivering him a copy is attached to the notice, and signed by the sheriff. This is sufficient proof of service. Section 292, 2 R. S. 1876, p. 154; *White v. Webster*, 58 Ind. 233.

5. That the evidence is insufficient to sustain the verdict.

The defect pointed out in the evidence is, that there is none which tends to prove a demand of the rent upon the lessee. No such demand was, nor was any such proof necessary. The rent was payable in sums certain, and at

fixed dates. When, by the terms of the contract, the obligation of the guarantor is the same as that of the principal, as in this case, then, as soon as the principal is in default, the guarantor is also in default, and may be sued immediately, and before any proceedings are had against the principal; and when, by his contract, the guarantor undertakes unconditionally, that his principal shall pay a given sum of money at a stated time, no demand of payment on the principal, or notice of his default, is necessary, before suing the guarantor. *Brandt Suretyship & Guaranty*, secs. 82, 170; *Smith v. Rogers*, 14 Ind. 224; *Virden v. Ellsworth*, 15 Ind. 144; *Leonard v. Shirts*, 33 Ind. 214; *Sample v. Martin*, 46 Ind. 226; *Bank, etc., v. Hammond*, 1 Rich. 281; *Peck v. Barney*, 13 Vt. 93; *Mann v. Eckford's Executors*, 15 Wend. 502; *Redfield v. Haight*, 27 Conn. 31; *Hoey v. Jarman*, 39 N. J. 523; *March v. Putney*, 56 N. H. 34; *Penny v. Crane Brothers Manufacturing Co.*, 80 Ill. 244.

Esther L. Taylor has presented the question of the sufficiency of the complaint, by an assignment of error, in this court. This is the only question that is discussed in her behalf.

There is no deficiency in the complaint, of which she can complain. There is no cause charged in it against her; the appellee sought and seeks nothing against her; there is neither a verdict nor a judgment against her. The verdict is against "the defendant," and must be held to refer to the defendant in the complaint. In rendering the judgment, the words "the defendants" are used, but in reference to the verdict which precedes; and the use of the word "defendant" in the singular number, which follows the use of the word "defendants" in the plural, is so clearly a clerical error—a mere misprision of the clerk—that we can not hold the judgment to be against any person but the defendant in the complaint. Esther L. Taylor can not

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come in as a defendant upon her own motion, for the purpose of defeating the appellee's claim against the guarantor, and, failing in that, then seek to reverse the judgment against the guarantor, because the complaint shows no cause of action against her. Besides, there being no judgment against her, there is nothing of which she can complain.

The judgment is affirmed, at the costs of the appellant Stephen O. Taylor, with ten per cent. damages.

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64	360
126	126
64	360
139	296
139	483

**UNITED STATES COURTS.—***Removal of Cause from State Court.—Application and Bond.*—A court of this State has the right to judicially pass upon the sufficiency of an application to remove a cause pending therein to a United States court, and of the bond accompanying the same.

**TAX SALE.**—A sale of land for taxes legally assessed may be illegal and void.

**SAME.—***Sale Without Demand for Personality.—Action to Set Aside.—Tender of Redemption Money.—Evidence.*—A sale of land for taxes, without a demand upon the owner for personal property, of which he has sufficient subject to levy and sale, is illegal and void; but, in an action to set aside such sale, and to declare the certificate thereof void, the plaintiff must both plead and prove a tender of the amount necessary to redeem.

**SAME.—***Liability of County to Purchaser.*—A decree setting aside such sale as void renders the county liable to the defendant, for the amount paid by him, unless he has received the same from the plaintiff.

**SAME.—***Judgment.—Land Illegally Sold Still Liable.*—The court has no power, in an action to set aside an illegal sale for legally assessed delinquent taxes, to decree the lands to be discharged from the lien of such taxes, as, under section 227 of the assessment act, 1 R. S. 1876, p. 124, the lands should be again placed upon the delinquent list.

From the Grant Circuit Court.

*J. T. Lecklider and O. S. Hadley, for appellant.*

*A. Steele and R. T. St. John, for appellee.*

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PERKINS, J.—This was a suit commenced in the Grant Circuit Court, to set aside a tax sale of the following lands, and to obtain a decree declaring them discharged of a lien for money paid on the sale for taxes, etc., viz.:

“The south-west quarter of the north-west quarter, and the north-west quarter of the south-west quarter, and the south half of the south-west quarter, of section thirty-three, in township twenty-five north, in range eight east, containing one hundred and sixty acres more or less; also the east half of the south-east quarter of section thirty-two, in said township and range, containing eighty acres.”

The complaint charged that said lands were illegally sold for taxes, specifying the points of illegality, one of which was that no demand for personal property was made, and averred that the plaintiff had duly tendered to the treasurer of said county, and to the defendant, the purchase-money paid at said sale, and the interest and penalties, and that he brings the amount into court, etc.

The appellee filed a demurrer to the complaint, assigning the following causes therein:

1. The complaint does not state a cause of action;
2. Defect of parties defendants;
3. Defect of parties plaintiffs;
4. The court has not jurisdiction of the defendant in, nor of the subject-matter of, the suit;
5. The plaintiff has not legal capacity to sue; and,
6. Misjoinder of causes of action.

The demurrer was overruled and an exception entered.

An application for the removal of the cause to the United States Circuit Court was denied.

Thereupon the defendant answered:

1. The general denial; and,
2. As follows: “The defendant, Frank McWhinney, further answering said complaint, says, the plaintiff elected to and did pay, on or before the third Monday of

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April, 1874, one-half of all the taxes levied upon the lands in the complaint described and collectible by the said county treasurer; that said lands were sold for the November instalment of taxes for the year 1873, and the taxes of the current year 1874; that the said sale to this defendant was in February, 1875; that complainant paid the first instalment of the said taxes due in April, 1874; that plaintiff assented to, and concurred in, the levy and assessment of said taxes, as therein charged on the said treasurer's books. Wherefore defendant prays judgment and all relief," etc.

Reply in general denial.

Trial by the court; finding for the plaintiff, "and that said sale for taxes, and the certificate of purchase thereon, made by the auditor and treasurer of said Grant county, Indiana, of the lands in complaint specified, were illegal and void," etc.

A motion for a new trial, for the reason that the finding was contrary to the evidence and the law, was overruled, and exception reserved.

A motion in arrest followed, which was also overruled, and exception noted, and judgment upon the finding entered.

The assignment of errors is as follows:

1. Denying the application to remove the cause to the United States Court;
2. Overruling the demurrer to the complaint;
3. Overruling the motion for a new trial;
4. Overruling the motion in arrest of judgment; and,
5. Rendering judgment for the appellee.

As to the first assignment of error:

The court below held the petition and bond presented on the application for removal insufficient, and for that reason denied the removal. It was competent and proper for the State court to pass judicially upon the sufficiency of the

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petition for removal and the bond accompanying it, and to deny the removal if they were insufficient. There has been great diversity of judicial decision upon this question, but the Supreme Court of the United States has settled the question in favor of the power of the State courts to decide upon the sufficiency of the application. *Insurance Company v. Pechner*, 5 Otto, 188; *Amory v. Amory*, 5 Otto, 186. See *Carswell v. Schley*, 59 Ga. 17. The Supreme Court of this State had decided the question the same way, at the May term of said court, 1875. *The Indianapolis, etc., R. W. Co. v. Risley*, 50 Ind. 60; *The Baltimore, etc., R. W. Co. v. The New Albany, etc., R. R. Co.*, 53 Ind. 597.

The second alleged error does not appear to us to be well assigned. We see no objection to the complaint. It will be observed that an illegal and void sale of land may take place for the collection of taxes legally assessed.

The error thirdly assigned, we think, exists. The motion for a new trial should have been sustained. The complaint in the case was not proved. No evidence of the tender averred in it was produced upon the trial. This averment was material, and its proof essential, to the plaintiff's recovery. The sale was shown to have been illegal. It was proved that no attempt was made to find personal property, before the sale of the real, though there was plenty of it upon the premises. See *Ellis v. Kenyon*, 25 Ind. 134. But proof that the sale was illegal was not enough to entitle the plaintiff below, the appellee here, to recover. The appellee was the owner of real estate sold for taxes. No deed had been made to the purchaser of the land. The time given the owner by the statute, in which to redeem, had not expired. He was still in possession, but he was seeking, in this suit, to have that sale set aside and his land freed from liability to pay said taxes. He was seeking this upon the equity side of the court, and in his complaint recognized the ancient but still living maxim,



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McWhinney v. Brinker.

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that he who seeks equity must do equity, and averred a tender of the money paid upon the tax sale; but, on the trial, he failed to prove this averment. If the sale was set aside as void, the county would be liable to refund the money received on the sale to the purchaser. Hence the owner of the property, in a suit like this, should pay to the county what it would be liable to refund to the purchaser, or he should pay such sum to the purchaser.

Section 227 of the act for the assessment of taxes, 1 R. S. 1876, p. 124, is as follows:

“Whenever the county auditor shall discover, prior to the conveyance of any lands sold for taxes, that the sale was, for any cause whatever, invalid, he shall not convey such lands; but the purchase-money and interest thereon shall be refunded out of the county treasury to the purchaser, his representatives or assigns, on the order of the county auditor; and such land, if originally liable to taxation, and being still delinquent, shall again be placed on the delinquent list, and the amount so refunded, with interest, be collected as in other cases.”

The lands in question were liable to taxation; hence the court could not, in this suit, decree them discharged from the payment of said taxes. See, also, other sections of the same act, and *Ward v. Montgomery*, 57 Ind. 276.

The case of *Harrison v. Haas*, 25 Ind. 281, is directly in point. The syllabus of that case is this: “Suit to enjoin the execution of a deed under a sale for taxes, and to remove the cloud from the title. The complaint alleged that the sale was illegal, because there was personal property out of which the taxes might have been made.

“*Held*, that a court of equity will not interfere to give the relief sought, until the amount of the taxes has been paid or tendered to the purchaser,” or, we may add, to the county for the purchaser.

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In the opinion of the court it is said, the plaintiff "asks a court of equity to place him in a better position than he would have occupied if he had at the proper time paid the taxes legally assessed against him, and which were a lien upon his land: that the court shall remove the cloud without the payment of the debt. \* \* It will not so much as lift a finger to remove a cloud while a moral obligation remains undischarged."

The judgment is reversed, with costs; cause remanded for further proceedings in accordance with this opinion.

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.STOUT, ADMINISTRATOR, ET AL. v. LAFOLLETTE, ADMINISTRATOR.

64	365
135	108

*WILL.—Construction of.—Legacy Payable out of Capital Stock.—Execution Against Legatee.—Injunction by Executor.*—The owner of a certain number of shares of the capital stock of an incorporated gas and coke company died testate, devising to A. and certain other legatees, severally, specified sums of money "to be paid out of the gas and coke company stock," and the residue to yet other legatees, and directing that his estate should be settled "without administration thereon or controversy between" the legatees. An administrator with the will annexed having been appointed, an execution against A. was levied upon a number of such shares equal in value to his legacy, whereupon the administrator brought an action to enjoin sale upon the execution.

*Held*, on demurrer to the complaint, that the devise to A. was not a specific legacy; but that, whether it was general, demonstrative or specific, it was not subject to execution.

From the Floyd Circuit Court.

*J. H. Stotsenburg*, for appellants.

*A. Dowling*, for appellee.

*NIBLACK, J.*—This was an action by David W. LaFollette, administrator of the estate of William Stevenson, deceased, with the will annexed, against Leonidas Stout,

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administrator of the estate of Benjamin F. Stout, deceased, and Lyman S. Davis, sheriff of Floyd county.

A brief summary of the facts set out in the complaint may be made, as follows :

That the defendant Leonidas Stout, as administrator as above stated, on the 26th day of December, 1867, recovered judgment against one John W. Stevenson, in the common pleas court of Floyd county, for one hundred and fifty-nine dollars and fifty cents and costs of suit ; that, on the 27th day of December, 1873, the said William Stevenson, then in full life, was the owner of thirty-two shares of the capital stock of the Gas Light and Coke Company of New Albany, of the value of fifty dollars per share, and that, on that day, he executed and published his last will and testament, which contained, amongst other provisions, the following :

“ Item 4th. I will, devise and bequeath unto my grandchildren, Sarah E. Stevenson, Willard J. Stevenson, and Adie Stevenson, each, the sum of one hundred dollars, to be paid out of the Gas and Coke Company stock.

“ Item 5th. I will, devise and bequeath unto my son, John W. Stevenson, the sum of five hundred dollars, to be paid out of the Gas and Coke Company stock. \* \* \*

“ Item 7th. I will and devise all the residue of my personal property, capital stock of the New Albany Gas and Coke Company, moneys and effects of whatever kind and description, to my three daughters, Mary Ann Marsh, Jane King and Elizabeth Hughes, to be divided equally between them ; and it is my desire that my estate shall be settled without any administration thereon, or controversy between my said children.”

That the said William Stevenson died on the 31st day of March, 1876, being still the owner of said thirty-two shares of gas and coke company stock, and leaving his said last will and testament, set out in part as above, unre-

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voked and in full force; that, on the 3d day of April, 1876, said will was duly proved and admitted to probate, and, on the 14th day of the same month, letters of administration, with the will annexed, were granted to the said David W. LaFollette, on the estate of the said William Stevenson; that, on the 5th day of April, 1876, an execution was issued on the judgment against John W. Stevenson, above described, he being the same John W. Stevenson named as a legatee in item No. 5 of the said William Stevenson's will above set forth, and directed to the said Lyman S. Davis, as the sheriff of Floyd county, who, by order of the said Leonidas Stout, levied said execution on ten shares of the capital stock of the gas and coke company referred to in said will, and advertised the same for sale, concluding with the averments that the said John W. Stevenson had no title to the shares of stock levied upon, that, "for the purpose of executing said will and carrying out the intentions of said testator, it will be necessary for him (the said LaFollette), as such administrator, to sell said stock so levied upon as aforesaid," and that such levy upon the same was a cloud upon his authority to make sale of such stock, and praying that the said Leonidas Stout, as the plaintiff in such execution, and that the said Davis, as sheriff as aforesaid, might be restrained and enjoined from making sale of the shares of stock so levied upon, or otherwise interfering with the said LaFollette's possession and control of such shares of stock in his said fiduciary capacity.

A demurrer to the complaint for want of sufficient facts was overruled, and the defendants answered, admitting all the material allegations in the complaint, except the averments that the said John W. Stevenson had no title to such shares of stock, and that it would be necessary for the plaintiff to sell said stock to execute the testator's will, and averring that the said John W. Stevenson was not a resi-

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dent householder of the State, that he had no other property subject to execution than the shares levied upon, that there were no debts, claims or liens against the estate or property of the said testator, and that there were assets enough in the hands of the plaintiff, after paying all the legacies, to pay all the costs and expenses of administration.

A demurrer was sustained to the answer, and, the defendants declining to answer, a judgment was rendered against them, perpetually restraining and enjoining them from selling the shares of stock so levied upon, or otherwise interfering with their possession or control, as prayed for in the complaint.

The appellants devote considerable time to the discussion of the question of the character of the legacy bequeathed to John W. Stevenson, by item No. 5 of the testator's will, contending that it is a specific, and not either a general or a demonstrative, legacy, carrying with it a proportionate amount of the shares of stock referred to in the will, which was subject to levy and sale, as the property of the said John W. Stevenson, when not needed for the payment of debts against, or of the expenses of the administration of, the estate of the testator.

Their argument is based upon the assumption, that, if the legacy in question shall be held to be a specific legacy, then it must follow, that, under the facts set up in the answer, the shares of stock levied upon, estimated to be the proportionate amount intended for the said John W. Stevenson, were subject to be levied upon and sold as his property.

In answer to the positions thus assumed by the appellants, we have to say :

1. That we can not regard the legacy to John W. Stevenson as a specific one. No specific thing is bequeathed by it. It is provided that a definite sum of money shall go to him, to be paid out of certain stock, and not by the

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transfer of any specified proportion or number of shares of such stock. This stock is charged with the payment of certain legacies, in items Nos. 4 and 5 of the will, without reference to the amount of it which might be required to pay, or consumed in paying, such legacies. Then, in item No. 7 of the will, the residue of such stock is bequeathed to his three daughters, thus indicating that the testator had no definite idea in his mind as to the amount of the stock which might be required to pay the legacies provided for in said items Nos. 4 and 5, and that he did not construe said last named items of his will as disposing of any definite number of the shares or proportion of such stock.

2. But, conceding that the legacy to the said John W. Stevenson was a specific legacy, it does not follow that it could be levied upon and sold as his property under execution.

In Freeman on Executions, section 129, it is said :

“It is very clear that all property in custody of the law is not subject to any seizure or interference by officers acting under writs of execution ; but some difficulty may be experienced in determining when property is so within the custody of the law as to be shielded by this rule. When a Court of Equity has acted by taking property into its possession by the appointment of a receiver, such property, whether real or personal, is clearly *in custodia legis*. The whole purpose of the suit might be defeated if an officer could wrest the property from the agent of the court, and sell it by virtue of a writ against one of the contending parties. Such property is not subject to execution.”

Further on in section 131 of the same book, it is said, that “Moneys and other chattels in the possession of administrators, executors, or guardians, in their official capacity, are almost universally conceded to be in custody

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of the law, and therefore "not subject to levy under execution. Also, that "In most instances, where decisions have been made holding that moneys in the hands of administrators, executors, or guardians could not be reached under process against the creditor, legatee, or ward who might become entitled to such moneys on a final settlement of accounts, the courts have professed to exempt such money, both because it was *in custodia legis*, and because it could not properly be said to belong to the defendant in execution until an order of the court had been entered finally establishing his right thereto, and directing that it should be paid over to him in pursuance of such order."

See, also, Herman Executions, 246 ; 3 Williams Executors, 6th Am. ed., 2,113 ; *Suggs v. Sapp*, 20 Ga. 100 ; *Waite v. Osborne*, 11 Me. 185 ; *Hancock v. Titus*, 39 Miss. 224 ; *Marvel v. Houston*, 6 Harring. Del. 349 ; *Barnes v. Treat*, 7 Mass. 271 ; *Beckwith v. Baxter*, 3 N. H. 67.

The principles enunciated in the extracts taken as above from Freeman on Executions are well supported by the authorities, and have, it seems to us, a practical application to the case in hearing.

From the authorities above cited, we think it plainly deducible, that legacies in the hands of an executor, or administrator with the will annexed, pending the settlement of the estate, whether general, demonstrative or specific, are not subject to levy and sale under an execution against the legatee.

We are therefore of the opinion, that the court did not err, either in overruling the demurrer to the complaint or in sustaining the demurrer to the answer, the shares of stock levied upon being clearly in the custody of the law, and not subject to execution upon the facts stated both in the complaint and in the answer.

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Kistler v. The State.

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The judgment is affirmed, at the costs of the appellants.  
Howk, C. J., having been of counsel in this case, was absent during its consideration.

Petition for a rehearing overruled.

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### KISTLER v. THE STATE.

CRIMINAL LAW.—*Blackmail.*—*Instruction.*—*Punishment for One Crime on Proof of Another.*—*Seduction.*—On the trial of an indictment charging the defendant with having threatened to accuse the prosecuting witness of the seduction of a woman whom the defendant himself had seduced, as the State claimed, the court instructed the jury, that, if they found the defendant guilty of blackmail, they might, "as bearing on the question of punishment," consider the facts in relation to the seduction by the defendant.

*Held*, that the instruction was erroneous.

SAME.—*Cause Stricken from Docket.*—*Nolle Prosequi.*—Where, by leave of court and in the absence of the defendant, a criminal prosecution is unconditionally and absolutely stricken from the docket, on the motion of the prosecuting attorney, it can not be reinstated, over the objection of the defendant, the effect of such action being that of a *nolle prosequi*.

From the Marion Criminal Circuit Court.

J. C. Denny, J. S. Reid and I. Klingensmith, for appellant.

T. W. Woollen, Attorney General, J. B. Elam, Prosecuting Attorney, R. B. Duncan, C. W. Smith and J. S. Duncan, for the State.

PERKINS, J.—In 1874, John Kistler was indicted and convicted of blackmailing Adam Hereth, and was sent to the state-prison. At the May term of this court, in the year 1875, the judgment of conviction in that case was reversed on account of the insufficiency of the indictment. *Kessler [Kistler] v. The State*, 50 Ind. 229.

At the November term of the Marion Criminal Circuit



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Kistler v. The State.

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Court, a new indictment was returned, charging the same offence, and as having been committed upon the same person. Trial thereon, conviction, and sentence of imprisonment in the state-prison. This judgment of conviction was reversed at the November term, 1876, of this court, for errors occurring at the trial of the cause. *Kistler v. The State*, 54 Ind. 400.

At the June term, 1877, of the Marion Criminal Circuit Court, a *nolle prosequi* of the indictment in the case was entered by the court, with the consent of the prosecuting attorney. Afterward, at the same term, the *nolle* was set aside. On the 29th day of December, 1877, the cause was stricken from the docket, with the consent of the court and the prosecuting attorney. On the 14th day of May, 1878, a motion was made to reinstate said cause on the docket, and set it down for trial; and, on the 17th of May, aforesaid, the court sustained said motion "to reinstate this said cause upon the trial docket," etc.

Afterward, on the 10th day of August, 1878, the cause came on for trial, before a jury duly empanelled to try the same, who found a verdict of guilty, etc., "and that he" (the defendant) "be fined in the sum of one dollar, and be imprisoned in the state-prison for a period of one year."

A motion for a new trial was overruled, and judgment and sentence entered upon the verdict.

On the trial, the court instructed the jury, that:

"The guilt or innocence of the defendant, upon the charge for which he is now being tried, does not depend on the question whether he seduced said Nellie Deloss, or was guilty of adultery with her or not; but you may consider the facts as to this, like all other facts in evidence, as bearing on the question of punishment, if you find him guilty."

Adultery, fornication and seduction may each be crimes in this State, 2 R. S. 1876, p. 431, sec. 15, and p. 466, sec. 21,

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and punished as such. Our constitution forbids that a man shall be punished twice for the same offence. But if, on an indictment for the offence of blackmailing, you may inflict punishment for the crime of seduction, as well as for that of blackmailing, you may put the defendant in jeopardy twice for the same offence; that is, you may punish twice for one and the same offence.

Counsel for appellee, without conceding any thing on the point, say :

“If there was error in instruction number seven and one-half” (the one we have quoted), “the defendant can not complain. That part of it, which says that the question as to whether he seduced Nellie Deloss or not can be taken into consideration in fixing the punishment if they should find him guilty, did him no harm, as they gave him the lowest penalty provided by law.”

We can not consent to this position. The instruction told the jury, in effect, that, if they should find the defendant guilty of the crime of blackmailing, the one for which he was being tried, then they might inflict punishment for other crimes, for which he was not being tried, without informing them even, in said instruction, that such other crimes must be proved beyond a reasonable doubt. This instruction gave to the jury an erroneous statement as to the law, viz., that a man might be punished in a prosecution for one crime for another for which he was not prosecuted. This would license the jury wrongfully to turn their attention and thoughts to the facts as to those other crimes, by which feelings and prejudices might be aroused against the defendant, and might naturally lead the jury, certainly in a doubtful case, to argue thus : “The court has told us that we have a right to punish the defendant for the crime of seduction on this trial for blackmailing, if we find him guilty of the blackmailing. It may be doubtful whether he is guilty of blackmailing, but it is clear that he is guilty of the

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seduction, and ought to be punished therefor; and, as he may be so punished in this case, if we find him guilty of blackmailing, it will not make much difference to him how the punishment comes, and we may as well waive doubts, find him guilty, and put on the punishment for seduction."

There are, probably, other errors in the record, but it is not necessary that we should note them.

The judgment is reversed, and cause remanded, etc.

The clerk will give the proper notice for the return of prisoner, etc.

ADDITIONAL OPINION.

PERKINS, J.—The judgment in this case was reversed on the 11th of March, 1879.

A point made in the case was not then decided. A petition has been filed asking that the court now decide the omitted point, as it becomes material in view of a proposed re-trial of the cause. A short recitation of facts will present the point referred to.

On the 29th day of December, 1877, during a regular term of the Marion Criminal Circuit Court, the following entry was made of record in said court, viz.: "On call of the docket, on motion of James E. Heller, prosecuting attorney, and by leave of the court, the following causes were stricken from the docket, to wit: No. 7851, The State of Indiana v. John Kistler, for Blackmailing." Afterward, on the 14th day of May, 1878, during a regular term of said court, a motion to reinstate said cause upon the docket was sustained, and exception reserved.

Subsequently the defendant was tried and convicted. That conviction was reversed, and it is now proposed to again try the defendant, the appellant, on said indictment.

It will be observed that this cause was unconditionally stricken from the docket, by the prosecuting attorney, with the leave of the court, in the absence of the defendant.

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*Easter v. Severin et al.*

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We do not doubt, that, by arrangement of the parties, a civil, and probably a criminal, cause may be temporarily omitted from the docket, without being absolutely dismissed. Perhaps the court may order that a cause may be temporarily omitted from the docket, without the consent of parties. But it would be inconsistent with the regard due to the rights of criminals even, to sanction the practice, and recognize as law a rule, that the court might strike from the docket and reinstate their causes, and order them re-arrested, at pleasure.

What we now decide in this case is, that the action of the prosecutor and court, in striking the case at bar from the docket unconditionally and absolutely, amounted to a *nolle prosequi*, and that the reinstatement of said cause, and the subsequent trial of the defendant, were illegal acts. *The State v. Woulfe*, 58 Ind. 17.

The indictment for blackmailing against Kistler is not pending in the Marion Criminal Circuit Court, and he can not be again tried thereon.

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EASTER v. SEVERIN ET AL.

**MORTGAGE.—Misdescription.—Complaint Against Subsequent Purchaser.—**

**Notice.—Mistake.**—In an action against the mortgagor and a subsequent purchaser, to foreclose a duly recorded mortgage on real estate described therein as "three town lots, \* being all the town lots owned by the" mortgagor, in a certain town, the complaint, without alleging any mistake in the drawing of the mortgage, alleged that the intention of the parties was to mortgage a certain tract of land adjoining said town, and that, as the purchaser well knew, such tract was all the land owned by the mortgagor in or about such town.

**Held**, on demurrer by the purchaser, that the complaint is insufficient.

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*Easter v. Severin et al.*

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*Held*, also, the contrary not being alleged, that he is presumed to be a purchaser for a valuable consideration.

*Held*, also, that the record of the mortgage was constructive notice of its own contents only.

*Held*, also, that a complaint to reform and foreclose such mortgage, for mistake, should allege a mutual mistake by the parties thereto, and that the purchaser had *actual* notice thereof.

From the Clay Circuit Court.

*B. F. Davis, B. Henderson and J. A. McNutt*, for appellant.

*I. M. Compton, G. A. Knight, C. Matson, W. W. Carter and S. D. Coffey*, for appellees.

Howk, C. J.—In this action, the appellees, partners under the firm name of Severin, Ostermeyer & Co., sued the appellant, Easter, and Adam and Eliza Starr, as defendants, in a complaint of two paragraphs, for the foreclosure of a certain mortgage and the recovery of the mortgage debt. The mortgage, dated October 30th, 1873, was executed by the defendants Adam Starr and Eliza Starr, his wife, to the firm of Severin, Ostermeyer & Co., to secure the payment of a note of the said Adam Starr, of the same date, for nine hundred dollars, and payable to said firm on or before April 1st, 1874. The mortgaged property was described in said mortgage as follows: "Three town lots in the Town of Benwood, being all the town lots owned by the said Adam Starr in the said town, situated in the county of Clay, in the State of Indiana."

The appellant answered the complaint by a general denial thereof. At the October term, 1874, of the court, on the 29th day of October, 1874, the defendants Adam and Eliza Starr were called and defaulted, and the cause was submitted to the court for trial. The court found for the appellees, that the facts alleged in their complaint were true, against the defendant Adam Starr for the amount due on his note, and against all the defendants, the appellant included, for the foreclosure of the mortgage; and the court rendered

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*Easter v. Severin et al.*

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judgment upon and in accordance with its finding, for the foreclosure of the mortgage, etc. On the next day, the appellant, Easter, moved the court in writing for a new trial, which motion was "granted upon the payment of all the costs by the defendant within forty days, and the court now grants each party leave to amend the pleadings herein, and this cause is continued."

Afterward, at the January term, 1875, of the court below, the appellees filed an amended complaint, in two paragraphs, against all the said defendants, the appellant included, upon the same cause of action described in the original complaint.

The appellant, Easter, demurred to each of the paragraphs of said amended complaint, upon the ground that, as to him, it did not state facts sufficient to constitute a cause of action, which demurrer was overruled by the court as to each of said paragraphs, and to these decisions the appellant excepted, and then answered the complaint by a general denial thereof.

At the June term, 1875, of the court, the cause was tried by a jury, who returned into court their verdict, signed by "Robert Smith, foreman," in the following words, to wit: "We, the jury, find for the plaintiffs." Thereupon the appellant, Easter, moved the court, in writing, to set aside the verdict of the jury, which motion was overruled, and the appellant excepted.

The court then rendered judgment, that the appellees recover of the appellant their costs in this action expended, taxed at seventy-five dollars and seventy-five cents, and accruing costs, and the court then ordered and decreed that the appellant's equity of redemption, in and to the mortgaged premises in suit, should be forever barred and foreclosed. It was further ordered by the court, that the premises described in said order, or so much thereof as might be necessary, should be sold as other property was

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*Easter v. Severin et al.*

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sold on execution, and the proceeds of such sale should be "applied on the payment of this judgment, interest and all costs hereon."

From this judgment, the appellant, Easter, alone has appealed to this court, and has here assigned, as errors, the following decisions of the circuit court:

1. In overruling his demurrer to the first paragraph of the last amended complaint;
2. In overruling his demurrer to the second paragraph of said complaint;
3. In rendering judgment against him for all the costs of the appellees, and in decreeing the sale of his lands to pay said costs;
4. In overruling his motion for a new trial; and,
5. In rendering judgment against him alone on the verdict of the jury.

In the first paragraph of their amended complaint, the appellees alleged, in substance, that, on the 30th day of October, 1873, the defendant Adam Starr, by his note of that date, a copy of which was therewith filed, promised to pay the appellees nine hundred dollars, on or before April 1st, 1874, with ten per cent. interest, and five per cent. attorney's fees if suit were instituted thereon, and that the same was due and wholly unpaid; that, at and before the date of said note, the said Adam Starr was the owner in fee and in the actual possession of the following described real estate in Clay county, Indiana, to wit: Commencing 18 rods west of the north-east corner of the west half of the north-east quarter of section 20, township 13 north, of range 6 west; thence south 18 rods; thence east 8 rods and 6 inches; thence north 9 rods; thence west 66 feet; thence north 9 rods; thence west 66 feet, to the place of beginning, containing three-fourths of one acre; that said land, prior thereto, had been divided by said Starr into three town lots, all of which were included and situ-

ated in the town of Benwood and its additions, in said Clay county, but had not then, nor since to the appellees' knowledge, been numbered; that, on said 30th day of October, 1873, the said Adam Starr and Eliza Starr, his wife, executed to the appellees a mortgage on said real estate, to secure the payment of said note when it became due, a copy of which mortgage was filed with and made part of said paragraph; that said land was described in said mortgage as "three town lots in the town of Benwood aforesaid, being all the town lots owned by the said Adam Starr in said town," and the appellees alleged that said land was all the town lots owned by said Adam Starr in said town of Benwood, at the time of the execution of said mortgage; that said mortgage was duly recorded in the recorder's office of said Clay county, on the 1st day of January, 1874; and that since the execution of said mortgage to the appellees, to wit, on the — day of —, 187—, the said Starr and wife conveyed said lots to the appellant, Easter, but at what particular date, or by what description, the appellees could not state, for the reason that the appellant had withheld his deed from the records of said county. Wherefore, etc.

In the second paragraph of the complaint, in addition to the facts stated in the first paragraph, it was alleged, that the real estate described in said paragraphs was a small strip of land, lying between the original plat of the town of Benwood and Bailey's addition thereto; that, long before the date of the mortgage sued on, the said strip of land had been divided by said Starr into three separate town lots, which were known and designated by all those acquainted with the same, as town lots in the town of Benwood, but had never been designated as such by numbers; that, at the time of the execution of the mortgage in suit, the said Adam Starr owned no other town lots in or about the town of Benwood, nor had he, at any time before or



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*Easter v. Severin et al.*

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since the date of said mortgage, owned any other town lots, or other real estate, in or about the town of Benwood, than that described by courses and distances, in the appellees' complaint; that the appellant was, at the time and since, the brother-in-law of said Adam Starr, and a frequent visitor to the house, and well acquainted with the real estate owned by said Adam, and well knew that he owned no other real estate in or about the town of Benwood than that described in said complaint, at and before he took his deed of said land, and he might or could have known, by an examination of the appellees' mortgage or the record thereof, that the mortgage did, or was intended to, cover the land described in said complaint, and so conveyed to him; and that the appellant had full notice of said mortgage, at and before he took said deed.

We may properly consider the legal sufficiency of the two paragraphs of the appellees' complaint, at one and the same time, and in the same connection; because, as it seems to us, the objections urged to one apply with equal force to the other of the said two paragraphs. The same causes of action are stated, and the same relief is demanded, in the one as in the other paragraph of the complaint. The property described in the mortgage sought to be foreclosed is three town lots in the town of Benwood. The property owned by the appellant is three-fourths of one acre of land, specifically described by courses and distances in the complaint, not platted into town lots and recorded, and not within the town of Benwood. The appellees did not allege, in terms, in either paragraph of their complaint, that there was any mistake in the mortgage sued upon, in the description of the mortgaged property or otherwise. The description in the mortgage is so vague and uncertain in its terms, that it can not and does not apply to any specific property, and certainly not to property outside of the town of Benwood.

It must be assumed, as against the appellees, as they do not allege the contrary in either paragraph of their complaint, that the appellant was a *bona fide* purchaser, for a valuable consideration, of the land particularly described in their complaint, and without actual knowledge of any claim or lien in favor of the appellees, by mortgage or otherwise, on that land. The record of the appellees' mortgage was constructive notice only of the contents of such record; and it was not alleged, in either paragraph of the complaint, that the appellant had any other notice than constructive notice of such mortgage. Constructive notice of a mortgage on three town lots, in the town of Benwood, is certainly not constructive notice of a mortgage on lots or lands outside of said town of Benwood.

It seems to us, that the appellees' mortgage can not be foreclosed as against the appellant, or against the land owned by him, until it has been so reformed by the judgment of the proper court, that it will cover the specific land which, the appellees allege, it was intended to cover thereby. If, by the mutual mistake of all the parties to such mortgage, as to any matter of fact, the lots or lands intended to be embraced in the mortgage were not embraced therein, the appellees might, perhaps, upon a proper showing of the facts in regard to such mistake, obtain a reformation of the mortgage, so that it would contain a correct description of such lots or lands. Upon proper allegations of such mutual mistake, in their complaint in this action, the appellees might, perhaps, have obtained a judgment for the reformation of the mortgage, the correction of the description of the mortgaged property, and for the foreclosure of the mortgage as reformed, and the sale of the property by the corrected description thereof.

It seems clear to us, that each of the paragraphs of the appellees' complaint failed to state a cause of action against the appellant, in this, that it did not allege a mutual mis-

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take of fact in the mortgage in suit, by all the parties thereto, and that the appellant had actual knowledge of such mistake, at the time he received his deed of the real estate described in said paragraphs. *Nelson v. Davis*, 40 Ind. 366; *Allen v. Anderson*, 44 Ind. 395; *Baldwin v. Kerlin*, 46 Ind. 426; *Nicholson v. Caress*, 59 Ind. 39; and, *The First National Bank of Centreville v. Gough*, 61 Ind. 147.

In our opinion, the court below erred in overruling the appellant's demurrer to each paragraph of the complaint.

Our conclusion, in regard to the insufficiency of the complaint, renders it unnecessary for us to consider now either of the last three errors assigned by the appellant.

The judgment against the appellant is reversed, at the appellees' costs, and the cause is remanded, with instructions to sustain the demurrer to each paragraph of the amended complaint, and for further proceedings.

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HAMPSON v. FALL ET AL.

REAL ESTATE, ACTION TO RECOVER.—*Defendant Claiming Equitable Title.—Making New Parties.*—In an action by one claiming the legal title to real estate, to recover possession and quiet title, a third person, claiming an equitable title thereto, may, on a proper showing, be made a party defendant.

SAME.—*Lands Purchased by One with Moneys of Another.—Implied Trust.—Mortgage by Holder of Legal Title.—Sheriff's Sale to Another.—Notice.—Counter-Claim.*—In an action to recover, and quiet title to, real estate, a defendant filed a counter-claim, alleging that, upon his enlisting in the United States army, he and his mother had agreed that all moneys remitted by him to her should be invested by her in real estate for him; that, pursuant to such agreement, he had remitted to her certain sums of money, with which she had purchased the real estate in question, but had

64	382
135	89
64	382
147	533
64	382
152	260
64	382
156	324

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taken the title thereto in her own name; that, without his knowledge or consent, she and her husband had mortgaged the same, to secure the husband's debt, to one who had notice of the trust; and that the plaintiff claimed title only under a sale on foreclosure of such mortgage.

*Held*, on demurrer, that the counter-claim is sufficient.

**SAME.**—*Foreclosure by Endorsee for Value and Without Notice.—Trust Implied Against Married Woman.*—On the trial of such action it was established, that the allegations of the counter-claim were true; that the deed to the mother had been duly recorded; that the mortgagee had taken the mortgage with notice of the defendant's claim; that the mortgagee had assigned the mortgage debt to the plaintiff and another, for value, but without notice of the trust; and that the plaintiff, on foreclosure of the mortgage, had purchased the realty at a sheriff's sale, and had received a sheriff's deed therefor.

*Held*, that there was an implied trust in the land in favor of the defendant, as against both the grantee and mortgagee, but that the plaintiff, having no notice thereof, is not bound thereby.

**PRACTICE.**—*Uncertainty in Pleading.—Motion.—Demurrer.*—Mere uncertainty in a pleading can be reached only by motion to make certain, and not by demurrer.

**SAME.**—*Instructions.—New Trial.—Assignment of Error.—Supreme Court.*—Error in giving instructions to a jury is ground for a new trial, but is not a proper assignment of error, in the Supreme Court.

From the Jennings Circuit Court.

*A. G. Smith*, for appellant.

*J. Overmyer* and *D. Overmyer*, for appellees.

**PERKINS, J.**—Henry Hampson sued Thomas Fall in an action to recover possession of, and quiet the title to, certain real estate, viz.: "Ten acres off of the south side of the north-east quarter of the south-east quarter of section thirty-three, in township seven, range eight; also lots numbered forty and forty-one in Peabody's Addition to the town of North Vernon, in Jennings county, Indiana."

On proper showing William Fall was made a codefendant.

Thomas Fall answered in general denial.

William Fall answered in general denial, and, in a second paragraph, by way of counter-claim, a statement of which we copy from the brief of appellant:

"The second paragraph of answer and counter-claim

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alleges, that, in the year 1863, appellee entered the armies of the United States for the term of three years, and that, at that time, there was an understanding had and an agreement made between appellee and his mother, Jane Fall, by the terms of which it was agreed, that whatever moneys appellee could save he should send to his said mother, by her to be invested in real estate for him; that, in pursuance of said agreement, during the years 1863-4-5, appellee sent his mother sums of money amounting in the aggregate to \$600, with which she bought lot 40 and paid \$150 toward lot 41 and \$100 toward the ten-acre tract in complaint mentioned; that the said Jane Fall took the title of all of said real estate in her own name, and on the 17th day of May, 1869, without appellee's knowledge or consent, mortgaged said real estate to Smith Vawter to secure the payment of her husband's debt, and that Smith Vawter at that time had notice of the existence of the trust set up in this paragraph—with the further allegation, that appellant acquired his title by a foreclosure of said mortgage and sale of the premises therein mentioned, upon execution, to pay said debt, etc. Upon this statement of facts appellee asks to be decreed the owner of lot 40 and have his interest determined and set apart in lot 41 and the ten-acre tract of land. To this paragraph a demurrer was overruled, and exception reserved by appellant."

He adds: "The whole defence of appellee to this action is presented in this paragraph of his answer. It does not come within either of the exceptions or subdivisions of the eighth section of the statute of frauds."

Reply in denial. Trial by jury. Verdict as follows:

"We, the jury, find for the plaintiff, as against the defendant William Fall, as to the ten acres of ground and lot number forty-one; and we find for the defendant William Fall, against the plaintiff, as to lot number forty: and we find for the other defendants, that they were not

in possession of either of the tracts of land in controversy, at the commencement of this suit, and have not been since.

“THOMAS OWEN, Foreman.”

“The other defendants” had disclaimed.

A motion by the plaintiff for a new trial was overruled, and judgment was rendered on the verdict.

The appellant assigns the following as errors:

1st. In allowing appellee to be made a party to the suit;

2d. In overruling appellant’s demurrer to appellee’s second paragraph of answer and cross complaint;

3d. In giving the 1st, 2d, 4th and 6th instructions to the jury; and,

4th. In overruling appellant’s motion for a new trial.

As this suit sought to quiet the title to the land in question, and also to recover possession, and as, in this suit, title might be quieted, it seems to us it was proper to admit William Fall as a defendant to the suit. He claimed the land by an equitable title.

As to the second assignment of error, we think the second paragraph of answer, by way of counter-claim, was sufficient on demurrer. It might have been subject to a motion for an order to make it more certain.

The third assignment of error alleges matter that might have been a ground of a motion for a new trial, but can not be assigned in this court as error.

The fourth assignment of error calls for a statement of the facts of the case as proved by the evidence: In 1863, Thomas Fall and Jane, his wife, resided in North Vernon, Indiana. In that year, William Fall, a son of said Thomas and Jane, then of the age of fifteen years, with the consent of his parents, volunteered to serve in the army of the United States, was accepted and went South. On leaving home he made an arrangement with his mother, Jane, by which he was to send to her the money he might receive in the Gov-

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ernment service, and she was to hold or invest the same for him in North Vernon real estate. His mother received from him, under this arrangement, some six hundred dollars or more, and with it purchased the real estate in question in this suit, but took the title in her own name instead of that of William. Subsequently she joined with her husband in a mortgage of said real estate to Smith Vawter, to secure a debt of about one thousand dollars, evidenced by four promissory notes, due, severally, in one, two, three and four years from date. The first of the series of said notes Vawter transferred, for value, to Edwin R. Wilson, and the remaining three, with the mortgage, to Henry Hampson, the appellant in this case. The notes and mortgage were not paid. Wilson and Hampson foreclosed the mortgage, and Hampson purchased the real estate mortgaged at a sheriff's sale thereof, on the decree of foreclosure, and in due time received a deed from the sheriff. The sheriff's sale was regular. The evidence that Vawter had notice of the equitable claim of William Fall is very unsatisfactory, but, as the jury found for William, we must, in considering the case, hold Vawter a mortgagee with notice. The deed to the property mortgaged was on record in the name of Jane Fall, as grantee, and she and her husband were in possession; and it is not claimed by any one that either Wilson or Hampson had any notice that said Jane was not the absolute owner. They had no notice of William's equitable title. It is undisputed that the real estate was purchased with the money of William.

On the title thus acquired, Henry Hampson prosecuted this suit to quiet that title.

The legal questions arising, we proceed to consider and decide.

Where the trustee of a party purchases land, and takes the title in his own name, and pays for it with the money of the *cestui que trust*; such trustee holds such land, by im-

plication, in trust for the *cestui que trust* whose money was used to pay for it; and this, even though the trustee be a married woman. 1 Perry Trusts, sec. 48; *Blair v. Bass*, 4 Blackf. 539; *Fausler v. Jones*, 7 Ind. 277; *Resor v. Resor*, 9 Ind. 347; *Tracy v. Kelley*, 52 Ind. 535; *Parmlee v. Sloan*, 37 Ind. 469; *Brannon v. May*, 42 Ind. 92; *Cook v. Tullis*, 18 Wal. 332; 1 R. S. 1876, p. 916, sec. 8; 1 R. S. 1876, p. 504, sec. 4.

The land in question in this suit, then, was conveyed by such a trustee, by way of mortgage, to Smith Vawter, and he having, as we have seen, at the time, notice of the trust, his title was affected by it. But it is enacted in this State, and it was the law before the enactment, that "No such trust, whether implied or created, shall defeat the title of the purchaser for a valuable consideration, and without notice of the trust." 1 R. S. 1876, p. 915, sec. 2. And "A purchaser without notice from a purchaser with notice, is protected; for his own good faith is a defence, and the bad faith of the vendor, like the bad faith of the original trustee in making the sale, can not injure an innocent party. So a purchaser with notice from a purchaser without notice is protected, not on his own merit, but on the merit of the innocent purchaser; for, if such purchaser could not sell the estate, he would be deprived of one of the valuable attributes of his property; but if the property comes back to the defaulting trustee, the trust will reattach to it, and a similar principle prevails at law. But in case a trustee sells an estate vested in him for a charitable use, the purchaser will be bound by the trust, though he has no notice; and so of an innocent purchaser from the first purchaser; in other respects purchasers of estates devoted to charitable uses are subject to the same rules that govern the purchase of other trust estates." 2 Perry Trusts, sec. 830. *Brown v. Budd*, 2 Ind. 442. The purchase of Hampson, the appellant, falls directly within these legal principles, if the sub-



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ject-matter of his purchase was within them. We think it was. Chancellor WALWORTH remarks, in *Keirsted v. Avery*, 4 Paige, 9, as quoted in *Glidewell v. Spaugh*, 26 Ind. 319, that "It is now settled that a judgment lien, being merely a general lien on the land of the debtor, is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the docketing of the judgment. And the court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor has in the estate."

But, in the case at bar, it was not a general judgment lien that the appellant purchased; it was a specific, a mortgage, lien, created by the act of the person whom the public records showed to be the legal owner, and who was in possession of the property, the real estate mortgaged. The mortgage was a conveyance of an interest in that real estate, and the appellant purchased that mortgage, the interest in that real estate which it conveyed, in good faith, relying on the public record, and the possession of the mortgagor, for title, and paying for the property a valuable consideration, and without notice of any trust.

We think the purchase falls within the provision of our statute above quoted. Such being the case, the court should have sustained the motion for a new trial.

The judgment is reversed, with costs; cause remanded for another trial.

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#### HUSTON, ADMINISTRATOR, v. STEWART.

CONTRACT.—*Proposition, and Promise to Pay, for Conveyance.—Complaint to Recover Purchase-Money.—Copy.—Administrator of Estate of Surviving Partner.*—In an action against the administrator of the estate of an intestate surviving partner, by the widow of a debtor of the partnership,

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the complaint contained a copy, and specifically alleged a compliance with the terms, of a writing executed by the partnership, as follows, viz.: "Mr. S." (the debtor) "requests us to say to you, in writing, what we will pay you, in addition to the claim he and you owe us. We will give you, by you and your husband giving us a clear title of a deed for the farm that is mortgaged to us, three hundred dollars." Prayer for a recovery for the purchase-money.

*Held*, on an assignment of error questioning, for the first time, the sufficiency of the complaint, that the writing is not the foundation of the action, and that the complaint is sufficient.

**SAME.**—*Statute of Frauds.—Executed Contract.*—Upon a conveyance of the lands referred to in such writing, the contract ceased to be merely executory, became executed, and was not within the statute of frauds.

**SAME.**—*Answer Alleging Encumbrance.—Reply Alleging Indemnity.—Abandonment of, by Failure to Give Evidence Under.*—The defendant in such action answered, that, prior to such conveyance, a judgment had been rendered which was a lien upon the land conveyed; to which the plaintiff replied that the deceased partners had retained, by agreement, a sum of money belonging to the debtor, sufficient to indemnify them against such judgment; and also, in another paragraph, that the amount of such judgment was much less than the sum agreed to be paid for the conveyance, and judgment was demanded for the residue; but on the trial no evidence was offered in support of the reply alleging indemnity.

*Held*, that the reply of indemnity was abandoned, and that the supreme court therefore need not consider it.

*Held*, also, on demurrer to such other reply, that it is sufficient.

**SAME.**—*Evidence.—Identifying Lands.—Admissions.—Record.—Acceptance.—Presumption.*—On the trial of such action the plaintiff introduced in evidence, over the defendant's objection, the writing copied into the complaint, proof of its possession by the plaintiff prior to the conveyance, certified copies of the record of such mortgage and conveyance, and also the deed under which the debtor held.

*Held*, that the evidence was competent.

*Held*, also, that the lands intended by the writing are identified by the mortgage and deed.

*Held*, also, that the fact that the deed was of record was *prima facie* evidence of its acceptance by the grantees.

**SAME.**—*Interest.—Excessive Damages.—Presumption.*—Interest on the contract price being proper, and having been allowed, and judgment having been rendered simply for the contract price, it is presumed by the Supreme Court, the contrary not appearing by the record, that the judgment lien on the land was liquidated by the interest computed.

**SAME.**—*Judgment Against Decedent's Estate.*—Judgment in such action was properly rendered payable out of the assets of the decedent's estate.

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From the Fayette Circuit Court.

*J. C. McIntosh and C. Roehl*, for appellant.

*T. M. Little and J. I. Little*, for appellee.

PERKINS, J.—A complaint as follows was filed in the Fayette Circuit Court:

"Mary A. Stewart, the plaintiff in the above entitled cause, complains of James N. Huston, administrator of the estate of William Huston, who was surviving partner of the firm of J. & W. Huston, and says that on the 15th day of February, 1870, James and William Huston were partners in trade under the firm name of J. & W. Huston; that at said date said J. & W. Huston, by their obligation in writing, a copy of which is filed herewith and made part hereof, promised to pay this plaintiff the sum of three hundred dollars, provided and upon this consideration that the plaintiff and her husband, William C. Stewart, now deceased, should convey to said firm a tract of land or farm, by deed giving to said firm a clear and unincumbered title to said tract of land, being the farm of the said Wm. C. Stewart upon which said firm then held a mortgage, and was situate in the county of Rush and State of Indiana, and described as follows, to wit: the north-west quarter of section fifteen, in township fifteen north, of range ten east. The plaintiff alleges that she, relying upon the said promise of said firm to pay her three hundred dollars, did, on the 15th day of February, 1871, join her said husband in conveying to said firm, by good and sufficient deed of general warranty, the premises heretofore described, a copy of which deed is filed herewith. The plaintiff alleges that said James Huston, one of the members of said firm, departed this life on the — day of —, —, leaving William Huston sole surviving partner of said firm; that said William Huston took upon himself the settlement of the partnership business of said firm, but before the full settlement of the same he died intestate, on the — day of —, 1873, and the

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defendant, James N. Huston, was appointed administrator of said decedent; that he qualified and took upon him the settlement of said William Huston's estate, and the settlement of the remaining portion of said partnership business. The plaintiff alleges that her claim, as evidenced by the aforesaid obligation in writing, is now justly due and wholly unpaid; that she ought, as she believes, to recover the sum of three hundred dollars, with interest thereon from the 15th day of February, 1871. Wherefore," etc.

Copy of written obligation mentioned in the above complaint:

"Mr. Stewart requests us to say to you, in writing, what we will pay you in addition to the claim him and you owe us. We will give you, by you and your husband giving us a clear title of a deed for the farm that is mortgaged to us, three hundred dollars. J. & W. HUSTON."

Whereupon the defendant answered as follows:

1. The general denial;
2. Payment by the firm of J. & W. Huston, during its existence; and,
3. That the plaintiff and her husband, William C. Stewart, never performed the condition mentioned in the written proposition mentioned, in this, that the deed to the land alleged in the answer did not convey the land clear and free of all incumbrance, to the said J. & W. Huston; that on the 24th day of January, 1871, being twenty-two days before the execution of said deed, one William J. Hankins recovered a judgment against the said William C. Stewart, in the Rush Circuit Court, of the county of Rush and State of Indiana, for the sum of three hundred dollars, which judgment yet remains of record in said court, a lien upon said land, unpaid and unsatisfied, etc.

A demurrer to the third paragraph of answer for want of facts was overruled, and exception entered.

A reply in denial of the second and third paragraphs of

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answer was then filed, and a second paragraph of reply to the third paragraph of answer, as follows :

“That the said firm of J. & W. Huston retained, by agreement of the parties, a sufficient sum of money, from moneys in its hands belonging to said William C. Stewart, to fully pay the said judgment of William J. Hankins, set up in the third paragraph of answer, and that said sum was so retained as an indemnity to them against said judgment, and that said firm never accounted for said money to said William C. Stewart, or to any person entitled to receive the same. Wherefore,” etc.

And the plaintiff replied further, in a third paragraph, to the third paragraph of answer, “that the judgment mentioned by the defendant, as having been obtained by William J. Hankins, in the Rush Circuit Court, against William C. Stewart, amounted to but eighty-five dollars. Wherefore she prays judgment for the remainder of her claim in this suit.”

A demurrer, for want of facts, was overruled to the above paragraphs of reply, and exceptions entered.

The cause was then tried by the court ; a finding made for the plaintiff, in the sum of three hundred dollars, and, over a motion for a new trial, judgment was rendered on the finding.

The reasons assigned in the motion for the new trial were :

1. Finding of the court not sustained by evidence ;
2. Said finding is contrary to law ;
3. Said finding is excessive in amount ; and,
4. Error of the court in admitting each of four items of evidence, viz., the letter from the Hustons, set out in the complaint ; the certified copy of the mortgage of William C. and Mary Ann Stewart to the Hustons on the farm mentioned in the complaint ; the deed of said Stewart and his said wife, made to the Hustons pursuant to the

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proposition from them, copied into the complaint, to pay three hundred dollars, in consideration of a clear deed; and the deed of James W. and Margaret T. Stewart to William C. Stewart.

The objection to each of these items was, that it was "incompetent, irrelevant and immaterial."

The assignment of errors is as follows:

1. The complaint of the appellee, Mary A. Stewart, in the court below, does not state facts sufficient to constitute a cause of action;

2. The court erred in overruling appellant's demurrer to the second paragraph of reply to the third paragraph of answer;

3. The court erred in overruling the demurrer to the third paragraph of reply to the third paragraph of answer;

4. The court erred in overruling the motion for a new trial; and,

5. The court erred in rendering judgment against appellant, and that the same be paid out of the assets in his hands belonging to the estate, etc.

A synopsis of the evidence introduced on the trial may properly be given here:

It was admitted "that James N. Huston, the defendant, is the administrator, as charged in the plaintiff's complaint." The genuineness of the signature of the firm of Huston & Huston, to the letter thereof, set out in the complaint, was proved, and the possession of the letter by the plaintiff, soon after its date. The duly certified copy of the record of a mortgage, properly recorded in Rush county, Indiana, executed February, 1867, by William C. Stewart and Mary A. Stewart, his wife, of Rush county, Indiana, to James and William Huston, of Fayette county, Indiana, upon the following premises, viz.: "The northwest quarter of section fifteen, in township fifteen north,

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of range ten east, in Rush county, Indiana, to secure," etc., was next given in evidence. This was followed by a duly certified copy, from the proper record of Rush county, Indiana, of a warranty deed to the same land described in the above mortgage, executed on the 15th day of February, 1871, by William C. Stewart and Mary A. Stewart, his wife, of Rush county, Indiana, to James and William Huston, of Fayette county, Indiana, and recorded on the 3d day of March, 1871.

It was proved that Mary A. Stewart, the plaintiff, was the wife of William C. Stewart, and had been for more than twenty years; that said William C. died in 1873 or 1874. The deed to him of the land from his grantor, dated 31st of January, 1867, duly executed and recorded, was then introduced in evidence. The defendant then read as evidence a duly certified transcript of a judgment for eighty dollars and forty cents, and costs, as set up in the third paragraph of answer.

The above is substantially all the evidence in the case.

The counsel for the appellant make the following points in their brief in this court, against the correctness of the action of the court below :

1. That the suit is upon the letter made an exhibit in the complaint, signed J. & W. Huston; that said letter is void by the statute of frauds, and could not be the foundation of an action;

2. That the second and third paragraphs of reply did not avoid the third paragraph of answer;

3. That the motion for a new trial should have been sustained, on account of errors occurring at the trial, in this, that the court erred in admitting in evidence the said letter of J. & W. Huston, and in rendering judgment for so large an amount, the same having included interest on the claim when there had not been a demand for payment, and the judgment should not have been made

payable out of the assets of the estate of William Huston.

We shall confine ourselves, in deciding the cause, to the points urged by counsel in their brief in this court.

1. The complaint in the case contains somewhat of a narrative of the transactions out of which grew this suit, and, in so doing, sets out a copy of the letter of the Hustons, promising to pay the plaintiff three hundred dollars for a conveyance of land. That letter, as a proposition for the purchase of land, may have been insufficient as a cause of action, but we do not regard it as the foundation of the action in this case. The complaint avers that the land had been conveyed to the Hustons. Under that allegation, without an averment of request, where the complaint was attacked for the first time in an appellate court, a recovery by the plaintiff could be upheld. *Stephen Pleading*, 146.

In *Brckett v. Evans*, 1 Cush. 79, in which case the statute of frauds was insisted upon as a defence, METCALF, J., in delivering the opinion of the court said: "Besides, the contract is executed by the plaintiff, and the defendant has received a conveyance of the houses, on the faith of his promise to pay the taxes thereon, so that the statute would not avail him, if his promise had originally been within it. A party who receives a grant of land, on his promise to pay for it, cannot avoid payment by showing that his promise was not in writing." *Sands v. Thompson*, 43 Ind. 18, and cases cited. A suit could not have been maintained upon said letter for the three hundred dollars till there had been a conveyance or tender thereof of the land, for that money was only to be due and payable upon such conveyance. When such conveyance was made the money would be due in consideration of the conveyance; and, in a complaint to recover the consideration for such conveyance, it would be necessary to aver only that the conveyance was made upon the request or promise to pay of the grantee; and it would not be



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material whether that request or promise was made in writing or by parol.

In the case at bar, the complaint avers that the conveyance was made upon a request or promise to pay, and sets out, unnecessarily, the letter in question as showing the fact. It would have been sufficient to aver the simple request or promise, but setting out the letter did no harm. We regard this suit as brought for the consideration for the conveyance of the land, and upon a sufficient complaint. It was not attacked by motion or demurrer so far as appears to this court. Under the code, a complaint is required, as to its material allegations, to state only the facts. Forms of action are abolished. 2 R. S. 1876, p. 53.

The third paragraph of answer avers that the land was not conveyed free of incumbrance, and that it was subject to the lien of a judgment.

The second paragraph of reply to said paragraph of answer was, that said Hustons had in their hands money of said William C. Stewart, the husband of the appellee, in an amount equal to the amount of said judgment, which, by agreement of the parties, said Hustons retained as an indemnity against said judgment, and had never otherwise accounted for to the appellee or any other person.

The third paragraph of reply stated that said judgment was for the sum of eighty-five dollars only, while the appellee's demand was three hundred dollars, and asked judgment for the amount that her claim was in excess of said judgment.

As to the second paragraph of reply, it was virtually abandoned. No evidence was offered in support of it on this trial. It need not therefore be further noticed.

The third paragraph of reply we regard as valid. It shows that the lien of the judgment, set up in the answer, was harmless.

We proceed to the alleged error in overruling the motion for a new trial:

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The principal ground of that motion was the admission of alleged illegal items of evidence; and first, the letter of the Hustons.

We re-copy that letter:

"Mr. Stewart requests us to say to you, in writing, what we will pay you, in addition to the claim him and you owe us. We will give you, by you and your husband giving us a clear title of a deed for the farm that is mortgaged to us, three hundred dollars. J. & W. HUSTON."

This letter shows on its face, that it is written to a Mrs. Stewart; that the Mr. Stewart, who is her husband, owns a farm that is mortgaged to said Hustons. There was evidence showing that the owner of that farm was William C. Stewart, and that he was the husband of the appellee, the plaintiff below. The mortgage upon that farm was given in evidence. The person to whom the letter was written was thus identified. Further, that farm was conveyed, by warranty deed, after said letter was written, to the writers of the letter, the Hustons, and accepted by them. Their acceptance of the deed was, *prima facie*, shown by the fact that it was legally recorded. The presumption is, that they delivered it for record. There is no evidence rebutting this presumption. Thus, the land referred to in the letter is conclusively identified by the acts of both parties. Under such circumstances, why would not that letter be admissible in evidence, to prove the amount to be paid for the land?

In Benjamin on Sales, sec. 205, 1st Am. ed., 1875, a very excellent work, it is said:

"And where a party has signed a paper which is not a writing agreed upon between the two, as containing the terms of their agreement, his adversary may use the paper, if he please, as an admission made in his favor, but he is not bound to offer it, any more than he would be bound to prove a verbal admission of his adversary, nor is the effect of a

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The Louisville, New Albany and Chicago R. W. Co. v. Jackson.

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written any greater than that of a verbal admission. In a word, it is always necessary to distinguish whether the writing is the contract of *both* parties, or the admission of *one*"

In the case at bar, the contract between the parties was a verbal one, executed, at the time it was made, by the conveyance of the land of Mr. Stewart, and the acceptance of it by the Hustons, to whom it was made. It has been conclusively shown that the letter of the Hustons referred to the land in question, and, in our opinion, it was clearly admissible in evidence, as an admission, by them, of the sum they were to pay for the land, if conveyed.

The other items of evidence, claimed to have been illegally admitted, were legally admitted.

We can not say the court erred in allowing interest. Interest being allowed, the judgment was for the proper amount, after deduction of the eighty five dollar judgment. *Killian v. Eigenmann*, 57 Ind 480.

The judgment was properly made payable out of the assets of Huston's estate in the hands of his administrator. Each one of the Hustons, as well as both, were bound for the ultimate payment of the purchase-money of the land.

The judgment is affirmed, with costs.

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THE LOUISVILLE, NEW ALBANY AND CHICAGO R. W. Co. v.  
JACKSON.

SUPREME COURT.—*Appeal.—Dismissal of, on Motion.—Action Originating Before Justice.—Amount in Controversy.—Jurisdiction.—An appeal to the Supreme Court, in an action originating before a justice of the peace, will*

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The Louisville, New Albany and Chicago R. W. Co. v. Jackson.

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be dismissed on motion, for want of jurisdiction, where it affirmatively appears by the record that the amount involved, exclusive of costs, does not exceed fifty dollars.

From the Clarke Circuit Court.

*T. J. Jackson*, for appellant.

*J. H. Stotsenburg*, for appellee.

Howk, C. J.—The appellee, upon notice to the appellant, has filed a written motion to dismiss this appeal, for the following causes:

“1. Because the Supreme Court has no jurisdiction whatever of said appeal; and,

“2. Because said appeal was taken by the appellant from a final judgment of the Clarke Circuit Court, the action having originated before a justice of the peace, and the amount in controversy did not exceed fifty dollars, exclusive of costs.”

These causes are all well assigned, and are fully sustained by the transcript of the record on file in this case.

This court has no jurisdiction of this appeal, under section 550 of the practice act, as amended by an act approved March 14th, 1877, which amended section prescribes and regulates the jurisdiction of this court, as to the amount in controversy in such cases as this. Acts 1877, Spec. Sess., p. 59.

We have decided that an appeal may be dismissed, upon motion, for the want of jurisdiction in this court of such appeal, where the want of jurisdiction is apparent in the record on file in this court. *Buntin v. Hooper*, 59 Ind. 589, and *The Evansville, etc., R. R. Co. v. Barbac*, 59 Ind. 592.

Appeals have been repeatedly dismissed by this court, where it appeared from the record that the amount in controversy was smaller than the amount prescribed by the Legislature as the amount necessary to give this court jurisdiction of the appeal. Under the amended section of the code above cited, the amount in controversy must

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Scott v. The State.

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exceed fifty dollars, exclusive of costs, or this court will have no jurisdiction of an appeal in such controversy. *Cowley v. The Town of Rushville*, 60 Ind. 327, and authorities cited.

The appeal in this case is dismissed, at the appellant's costs, for the want of jurisdiction.

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#### SCOTT v. THE STATE.

64	400
135	414
64	400
140	308
64	400
154	577
64	400
167	133
64	400
169	440

**CRIMINAL LAW.**—*Impeaching Witness, by Contradicting him*—Where, on the cross-examination of a witness for the State, he denies having made a certain statement indicating hostility toward the defendant, he may be contradicted.

**SAME.**—*Instruction Assuming Fact.*—The assumption by the court, in its instructions to the jury, of the existence of a fact in dispute on the trial, is erroneous.

From the Shelby Circuit Court.

*B. F. Love, G. M. Overstreet, A. B. Hunter, C. Byfield and L. Howland*, for appellant.

*T. W. Woollen*, Attorney General, for the State.

**WORDEN, J.**—The appellant, John Scott, was indicted in the court below, for an assault upon one James R. Tucker, with intent to murder him, by shooting him with a pistol.

Upon trial by a jury he was convicted and sentenced to imprisonment in the state-prison for the period of two years, and fined in the sum of one dollar.

On the trial there was evidence tending to show, that, on the evening of the 1st of January last, there was a social party and dance at the house of Tucker, where the appellant went on that occasion, as it would seem, uninvited. There seemed to have been some difficulty before that time between the appellant and Tucker. That when Tucker found the

appellant in his house he directed him to go out, which he did, but returned again in the space of twenty or thirty minutes. When the appellant returned into the house, Tucker again ordered him out, but the appellant seeming to "stand upon the order of his going," Tucker seized him and pushed him out backwards at the door.

When the appellant and Tucker were thus out of the house, the appellant drew from his pocket a pistol and fired at Tucker, but missed him, the ball striking the side of the house. There was evidence tending to show that before the appellant shot, Tucker had stooped down and picked up a brickbat (two-thirds of a brick), and was about to strike the appellant with it, or throw it at him; but upon this point the evidence was quite conflicting. Perhaps it may be said that the evidence preponderated against the brickbat element in the case.

On the trial of the cause one James Weimer was an important witness for the State, who gave a detailed statement of the transaction as seen by him. On cross-examination by the defendant's counsel he was asked several questions designed to show that he took some interest in the matter, or had some feeling, against the defendant. He denied that he had a knife out during the progress of the difficulty, or that he had made threats to cut the defendant. One of the questions thus put was the following:

"Did you not say to 'Squire Fisher,' (alluding to a conversation between the witness and Fisher about the difficulty, soon thereafter, and at the place thereof,) "'it is well you stopped it when you did, for I had my knife out?'" The witness answered, "I did not."

At the proper time the defendant introduced 'Squire Fisher, who was a justice of the peace, and was present at the time of the difficulty, and offered to prove by him, that, at the residence of Tucker, shortly after the difficulty, and in speaking of it, the witness Weimer made the statement

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Scott v. The State.

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contained in the question above set out; but, on objection by the State, the evidence was ruled out as irrelevant, and the defendant excepted.

We are of opinion, that the court erred in excluding the evidence thus offered. If the witness Weimer made the statement imputed to him, it indicated a feeling, to a greater or less extent, of hostility to the defendant. The evidence should have gone to the jury to enable them to put a just estimate upon the evidence of the witness.

"It has been held," says Mr. Greenleaf, "not irrelevant to the guilt or innocence of one charged with a crime, to enquire of the witness for the prosecution, in cross-examination, whether he has not expressed feelings of hostility towards the prisoner. The like enquiry may be made in a civil action; and if the witness denies the fact, he may be contradicted by other witnesses." 1 Greenl. Ev., sec. 450.

At section 455 of the same volume it is said: "There is certainly great force in the argument, that where a man's liberty, or his life, depends upon the testimony of another, it is of infinite importance that those who are to decide upon that testimony should know, to the greatest extent, how far the witness is to be trusted."

Some other evidence of a similar character was offered and rejected, which need not be specially noticed.

The following proposition is found in one of the charges to the jury, to which exception was taken:

"The prosecuting witness had the right, after he had invited the defendant to leave his house, and he had refused, to use such force as would be necessary to eject him, and also to require him to leave his yard."

This charge is objected to, because it assumes that a certain state of facts was shown to have existed, namely, that the prosecuting witness invited (this word was used, we suppose, in the sense of requested) the defendant to

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Snyder v. Bunnell, Administrator, et al.

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leave his house, and that the defendant refused to do so. The charge seems to us to be open to the objection made, and is therefore erroneous. It clearly assumes that the prosecuting witness had invited the defendant to leave his house, and that the defendant had refused to do so.

These were matters for the exclusive determination of the jury, and they should not have been assumed by the court as established.

The court may propound the law to the jury, as applicable to a given state of facts, in case the jury should find the facts established; but it cannot rightfully assume the existence of the facts, not in some way conclusively admitted by the parties, and propound the law accordingly. *Conaway v. Shelton*, 3 Ind. 334; *Reynolds v. Cox*, 11 Ind. 262; *Staats v. Burke*, 16 Ind. 448; *Smathers v. The State*, 46 Ind. 447; *Barker v. The State*, 48 Ind. 163; *Dæring v. The State*, 49 Ind. 56; *Matthews v. Story*, 54 Ind. 417; *Kilian v. Eigenmann*, 57 Ind. 480.

The judgment below is reversed, and the cause remanded for a new trial. The clerk will give proper notice.

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SNYDER v. BUNNELL, ADMINISTRATOR, ET AL.

**MORTGAGE.—Foreclosure.**—A complaint for foreclosure was based upon a writing executed by A. to B., reading "This indenture witnesseth that A., "\*, for the sum of \*, has mortgaged and assigned to" B. "• the Monticello Woollen Mills, situated \*, consisting of the building, all the machinery therein," etc., to secure certain promissory notes described therein.

*Held*, that the instrument sued upon is a mortgage.

**SAME.—Averment as to Record.**—The complaint in an action to foreclose a mortgage need not aver that the mortgage has been recorded, where the action is between the original parties to the mortgage, or their assignees or legal representatives.

**PRACTICE.—Failure to Perfect Change of Venue.—Failure to Answer.—Trial,**



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Snyder v. Bunnell, Administrator, *et al.*

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*as Upon Default.*—In an action wherein a defendant had appeared, demurred, and been ruled to answer to a cross-complaint filed by a codefendant, a change of venue from the county was granted but never perfected, whereupon the court, at its next term, made the rule to answer absolute and tried the cause.

*Held*, that the action of the court was proper.

From the Carroll Circuit Court.

*A. W. Reynolds* and *E. B. Sellers*, for appellant.

BINDLE, J.—Complaint by the appellee, who was the administrator of George W. Spencer, deceased, against the appellant, to obtain judgment on certain notes secured by a mortgage on the Monticello Woollen Mills, fixtures and stock, executed by the appellant to the deceased in his lifetime, and to foreclose the mortgage.

One of the notes secured was executed by Snyder, the mortgagor, to Spencer, the mortgagee; the other was executed by George W. Spencer, G. S. Kendall and W. R. Kendall, payable to Maria Batt, and assigned by her to Ira Kingsbury, and by him to the Lafayette Savings Bank.

These are the substantial averments in the complaint. The mortgage was made an exhibit, and the proper breaches alleged.

The Lafayette Savings Bank filed a cross complaint, making Snyder the defendant therein.

Issues were formed on the original complaint, and a trial by the court had, which resulted in a finding and judgment against Snyder, upon the note executed by him to Spencer.

Snyder demurred to the cross complaint, filed by the Lafayette Savings Bank against him, for the alleged want of facts. His demurrer was overruled, but it does not appear that he excepted to the ruling. He has assigned as error, however, in this court, the insufficiency of the complaint, which presents the question of its sufficiency for our consideration. After the demurrer of Snyder to the cross complaint was overruled, he was, at the February term of the court, 1877, ruled to answer the cross complaint.

At the same term, the venue, as between the bank and Snyder, was changed, by the agreement of the parties, to the White Circuit Court. It does not appear which party applied for the change. The change was not perfected by either party. At the April term, 1877, the rule against Snyder to answer—not having been complied with—was made absolute; whereupon the court tried the case, as upon default, and found in favor of the bank, and rendered judgment accordingly. To this proceeding no objections were made by Snyder, and no exceptions reserved.

The questions presented by the assignments of error in this court, and which are discussed by the appellant in his brief, are:

1. The insufficiency of the complaint;
2. The insufficiency of the cross complaint; and,
3. The irregularity of the trial on the cross complaint.

1. The grounds taken against the sufficiency of the complaint are, that the alleged mortgage does not appear upon its face to be a mortgage, and that there is no averment that it was ever recorded.

The language of the mortgage is as follows:

“This Indenture Witnesseth: That Henry Snyder, of Monticello, county of White, and State of Indiana, for the sum of three thousand three hundred and eighty-five dollars, has mortgaged and assigned to George W. Spencer, of said county and State, the Monticello Woollen Mills, situated on the west bank of the Tippecanoe river, in said town of Monticello, consisting of the building, all the machinery therein,” etc., and then describes the notes and states the usual conditions upon non-payment.

It appears to us very clear that such an instrument is a mortgage.

An averment that the mortgage was recorded was not necessary. The suit is between the original parties, Bunnell, the administrator of the mortgagee, and Snyder, the mortgagor.

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The Bristol Milling and Manufacturing Company *et al.* v. Probasco.

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2. The same objections are made to the sufficiency of the cross complaint, and may be answered in the same way. The payment of the note held by the bank, of which the mortgagee was a maker, was secured by the mortgage to the mortgagee. The bank, being the holder of this note, stood, in equity, in the place of the mortgagee. See *The South Side Planing Mill Association v. The Cutler & Savidge Lumber Company*, *post*, p. 560. It was therefore no more necessary that the mortgage should be recorded, as against the bank, than it was as against the mortgagee.

3. We see no irregularity in the trial on the cross complaint in the Carroll Circuit Court. Both parties were in court. The appellant was under a rule to answer the cross complaint, before the change of venue was granted by agreement. Neither party perfected the change of venue; the case and the parties, therefore, remained in the Carroll Circuit Court. When the appellant failed to comply with the rule against him to answer, he was liable to judgment as by default. *Risher v. Morgan*, 56 Ind. 172.

The judgment is affirmed, at the costs of the appellant.

64 406  
146 552

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THE BRISTOL MILLING AND MANUFACTURING COMPANY ET AL.  
v. PROBASCO.

INSOLVENT CORPORATION.—*Receiver.*—*Action by Creditor.*—*Distribution of Assets.*—*Purchase of Stock, and Assumption of Debts of Corporation.*—*Novation.*—*Payment.*—*Promissory Note.*—*Mortgage.*—In an action against an insolvent incorporated stock company, its duly appointed receiver and A., to recover for money expended by the plaintiff for the use of the company, the court found, specially, that the capital stock of the corporation had once been owned, severally, by A., B., C., D. and the plaintiff, who were also directors of the company; that the corporation was then indebted to B., C. and the plaintiff, severally, in certain sums of money expended for its use, evidenced by its promissory notes; that thereupon the stockholders entered into an agreement that B., C., D. and the plaintiff should transfer their stock, and surrender such promissory notes, to A., who was to assume the payment of the same individually, and to execute his promissory notes to the retiring stockholders, severally, for the price

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The Bristol Milling and Manufacturing Company *et al.* v. Probasco.

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of the stock sold by, and the debt due to, each; that this agreement had been duly executed, but that the corporation had never assented thereto; that there was no agreement that A.'s individual notes should be accepted in payment of the company's notes; that A., to secure the notes so executed by him, had executed a mortgage to the retiring partners, upon the property of the corporation; that the corporation was then largely indebted to other creditors; and that A.'s notes remained unpaid, and he had become insolvent.

*Held*, as a conclusion of law, that the plaintiff was entitled to share, *pro rata*, with the other general creditors of the corporation, for the money so paid by him for the use of the corporation, but that the debt for the stock sold was payable only from the surplus, if any, after the payment of the general debts.

*Held*, also, that, because of the failure of the corporation to assent to such agreement, there was no novation. ✓

*Held*, also, that such debt was not paid by such exchange of notes.

From the Elkhart Circuit Court.

*J. M. Vanfleet, R. M. Johnson and J. D. Osborn*, for appellants.

*J. H. Baker and J. A. S. Mitchell*, for appellee.

Howk, C. J.—In this action the appellee, as plaintiff, sued the appellants, as defendants, in a complaint of a single paragraph. In his complaint, the appellee alleged, in substance, that, on and before the 21st day of January, 1874, the appellant, The Bristol Milling and Manufacturing Company, was a corporation duly organized and existing under and by virtue of the statute of this State, in such case made and provided; that, at said date, the said appellant company was indebted to the appellee in the sum of three thousand and thirteen dollars, for money paid, laid out and expended, to and for the use and benefit of said appellant and at its special instance and request, a bill of particulars of which was attached to said complaint; that said sum remained due and unpaid; that, upon due proceedings had for that purpose, the appellant company was, by said Elkhart Circuit Court, adjudged insolvent at the ——— term, 1874, of said court, and by the order and judgment of said court, then duly made, the ap-

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The Bristol Milling and Manufacturing Company *et al.* v. Probasco.

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pellant Charles C. Merritt was duly appointed receiver, to collect the assets and pay the debts and liabilities of said company; and that, in pursuance of said appointment, the appellant Merritt had entered upon the execution of his said trust; that the appellant Patterson claimed an interest in said fund [adverse?] to the appellee, and was made a party to answer said complaint. Wherefore, by reason of all the premises, the appellee prayed judgment against the appellant company for four thousand dollars, and other proper relief.

To this complaint, the appellant Charles C. Merritt, receiver of said company, answered in two paragraphs, in each of which he set up affirmative matters, by way of partial defence.

The appellee demurred to each of said paragraphs of answer, upon the ground, as to each paragraph, that it did not state facts sufficient to constitute a defence to his complaint.

The court overruled the demurrer to the first paragraph, and sustained the demurrer to the second paragraph of said answer, and to this latter decision the appellant Merritt excepted.

The appellee replied by a general denial to the first paragraph of said answer.

The issues joined were tried by the court, without a jury; and, at the appellants' request, the court stated the facts found, and its conclusions of law thereon, as follows:

"This cause having been submitted to the court for trial, and the defendant having, at the proper time, requested that the court find the facts specially, together with its conclusions of law, the court does find as follows, to wit:

"That said Bristol Milling and Manufacturing Company was a corporation, duly organized under the statute of this State, on and before the 20th day of January, A. D. 1874, with a capital stock of \$20,000.00, owned as follows, viz.: By Fernando C. Patterson, \$10,000.00; by George Mil-

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*The Bristol Milling and Manufacturing Company et al. v. Probasco.*

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burn, \$6,000.00 ; by Samuel B. Romaine, \$2,000.00 ; by William Probasco, the plaintiff, \$1,000.00 ; by Daniel Ebi, \$1,000.00.

“That said Patterson, Milburn, Romaine, Ebi and the plaintiff were owners of the entire capital stock of said company ; that, on the 20th day of January, 1874, said company was indebted to the plaintiff in the sum of \$3,013, for money loaned and advanced by the plaintiff to the company, in the proper course and conduct of the business of the company, which indebtedness was evidenced by the promissory note of the company delivered to, and at the time held by, the plaintiff ; that said Patterson was the president, said Milburn the secretary, and Romaine treasurer, and all said stockholders, including the plaintiff, were directors of said company ; that said company at the time was indebted, in like manner and for different sums, to said Milburn and to said Ebi, said debts being also evidenced by the promissory notes of said company, viz. : to Ebi in the sum of \$——, and to Milburn in the sum of \$300 ; that, on the 21st day of January, 1874, the said Patterson, Milburn, Romaine, Ebi and plaintiff made a bargain and agreement, whereby said Patterson agreed to purchase, and did purchase, of said Milburn, Romaine, Ebi and plaintiff, all their stock in said company, at and for the price of 40 cents on the dollar, and said stock was then and there accordingly assigned by said parties to said Patterson (whereby he became sole owner of the stock of said company) ; and, as a part of the consideration and terms of said agreement, so made between the parties, said Patterson agreed to assume and pay all the debts and liabilities of said corporation, and accordingly, and in consummation of the agreement, said Patterson executed to said parties, respectively, his promissory notes for the sums agreed to be paid them for their stock, and to the said Milburn, Ebi and plaintiff respectively, gave and executed his notes, not

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The Bristol Milling and Manufacturing Company *et al.* v. Probasco.

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only for the sums agreed to be paid for their stock, but for the amounts due them from said company evidenced by notes as hereinbefore stated; that is to say, said Patterson executed his note to Samuel B. Romaine for \$800 (all for stock), to George Milburn for \$2,700 (\$2,400 for stock, balance debt of company), to William Probasco, plaintiff, for \$——— (\$400 for stock, balance debt of company), to Daniel Ebi for \$1,493.25 (\$400 for stock, \$1,093.25 debt of company); and, for the purpose of securing said notes so executed by him, said Patterson executed (in his individual capacity) a mortgage upon the real estate, mills and other property, theretofore owned and operated by said company, which mortgage the said Milburn, Romaine, Ebi and plaintiff accepted, believing the same to be good and valid security, and believing that, they having transferred all their stock to Patterson, and he being the sole owner of the entire stock, he had a right to mortgage the property, and believing too that Patterson did not intend to keep up the organization, and that the company was in fact dissolved by reason of Patterson becoming sole owner of the stock, they accepted said notes and mortgage, and surrendered said corporate property all to the possession and control of said Patterson; and said Milburn, Ebi and plaintiff surrendered their several notes against said company to said Patterson; said agreement, made between the parties, was reduced to writing and duly signed and executed, but the same has been lost; there was not any thing said in said agreement, nor by the parties in connection with or at the time of the transaction, in reference to whether said notes of Patterson were accepted by said Milburn, Ebi and plaintiff in payment or satisfaction of their said claims against the said corporation; that Milburn, Ebi and plaintiff gave up to Patterson (who was assuming to pay all the debts of the company) their notes against the company, believing that, by force of the acts they were then engaged in, the

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company's existence was being or would be terminated, and for the debts evidenced by said notes received the individual notes and mortgage of Patterson. Patterson did not intend at the time, nor say that he intended, to abandon the organization, and shortly afterward assigned shares of stock to other parties, and kept the corporate organization in existence; that said corporation, at the time of said agreement, was largely indebted to other persons; that afterward said mills and most of the property of said company were consumed by fire, and said corporation and said Patterson became and ever since have remained insolvent, said Patterson having no property subject to levy and sale upon execution; that heretofore said defendant Merritt was by this court appointed and is now receiver of the assets of said company.

"Upon the foregoing facts the court deduces the following conclusions of law:

"1st. That said mortgage, executed by Patterson to Romaine, Milburn, Ebi and plaintiff, was invalid and of no effect as against the creditors of said corporation;

"2d. That said Milburn, Ebi and plaintiff did not, by accepting said notes and mortgage, waive or surrender their right of recourse on the corporation, in case of failure to collect of Patterson;

"3d. That the claim of said Ebi, for the said sum of \$1,093.25, should be allowed and paid *pro rata* with the claims of general creditors of the company, and the said sum of \$400 should be paid only out of such surplus as may remain, after paying the general creditors;

"4th. That said Milburn should be allowed and paid, on the same footing with general creditors, the sum of \$300, and out of the surplus, if any, the sum of \$2,400;

"5th. Said Probasco should be allowed and paid, on the same footing with the general creditors, the sum of \$3,013, and out of the surplus, if any, the sum of \$400.

(Signed,) "WILLIAM A. Woods."



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The appellants, the Bristol Milling and Manufacturing Company and Charles C. Merritt, receiver, excepted to the court's conclusions of law, upon the facts found, and the same appellants then moved the court for a *venire de novo*, which motion was overruled by the court, and to this ruling they excepted. Judgment was rendered upon the facts found, in accordance with the conclusions of law.

The following decisions of the circuit court have been assigned as errors, by the appellants, in this court :

1. In sustaining the appellee's demurrer to the second paragraph of the answer;
2. In overruling the motion for a *venire de novo* ;
3. In the court's conclusions of law upon the facts found.

Two questions are discussed by the appellants' counsel, in their argument of this cause in this court, as arising upon the record and their assignment of errors thereon :

1. The validity of the original debt of the appellant, the Bristol Milling and Manufacturing Company, to the appellee, as a stockholder and director of said company; and,

2. The alleged novation of said original debt, by the appellee's acceptance of Patterson's note and mortgage for the amount of said debt.

We will consider and decide these questions, in the same order in which counsel have presented them.

It is not claimed that the debt of the appellant corporation to the appellee, as a stockholder and director, was invalid and void as between them, but that the appellee's claim against the company should not stand upon the same footing and share ratably with the claims of other creditors, who were not stockholders and directors of the corporation. We know of no legal reason for any such discrimination against the stockholder or director, who has become a *bona fide* creditor of his corporation

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The Bristol Milling and Manufacturing Company *et al.* v. Probasco.

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for money loaned thereto in aid of its business. In this case, the appellants do not question the good faith of the appellee's loan to the appellant corporation, nor its power to borrow the money in furtherance of its business, nor was any fraud or improper dealing imputed either to the company, or to the appellee; but upon the ground solely, that he was a stockholder and director of the company, as alleged in the second paragraph of the answer, it is insisted that the appellee's claim should be postponed, until all the creditors who were not stockholders of the company, had been fully paid. We cannot approve of this position. *Merrick v. The Peru Coal Co.*, 61 Ill. 472.

It seems to us that the facts found by the court in this case do not show a novation of the original note of the appellant corporation, held by the appellee. It was found by the court that the note in question was executed by the company, to the appellee, for money loaned and advanced by him to the company in the proper course and conduct of its business. It was agreed between the appellee and the defendant Patterson, that the latter would give his note to the appellee for and in lieu of his note against the company. It was not found by the court that Patterson was indebted to the company in any sum whatever, or that the company was in any sense a party to, or in any wise approved of, the agreement between the appellee and Patterson. The company did not hold Patterson's note, and of course did not give such note to the appellee for and in lieu of the note held by him against the company. But the giving of Patterson's note to, and the acceptance of such note by, the appellee, was the consummation of a personal contract between him and Patterson, to which, so far as the record shows, the company gave no assent and was not asked to assent. In the case of *Clark v. Billings*, 59 Ind. 508, it was said by BIDDLE, J.: "In every novation there are four essential requisites: First, a previous valid obliga-

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Mauck *et ux.* v. Melton *et al.*

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tion; second, the agreement of all the parties to the new contract; third, the extinguishment of the old contract; and, fourth, the validity of the new one." It is very certain, we think, that, under the facts found by the court in this case, there was no novation of the note held by the appellee against the appellant corporation.

The case made by the record, putting it in its strongest and most favorable light for the appellants, was simply this: The appellee, holding a valid and legal obligation against the appellant company, took Patterson's note in lieu thereof, and surrendered the same to Patterson. But the court expressly found that the appellee did not agree to accept said Patterson's note in payment or satisfaction of his said claim against the said corporation. The facts found by the court bring this case fairly within the doctrine laid down by this court in the case of *Tyner v. Stoops*, 11 Ind. 22, in which case it was said that "no principle of law is better settled than that taking a note either from one of several joint debtors, or from a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to be taken as payment, and at the risk of the creditor." The case last cited has been approved and followed by this court in the following cases: *Stevens v. Anderson*, 30 Ind. 391; *Maxwell v. Day*, 45 Ind. 509; *Alford v. Baker*, 53 Ind. 279; and *Hill v. Sleeper*, 58 Ind. 221.

In our opinion, upon the facts found, the circuit court did not err in its conclusions of law.

The judgment is affirmed, at the appellants' costs.

Petition for a rehearing overruled.

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MAUCK ET UX. v. MELTON ET AL.

VERBAL CONTRACT TO CONVEY OR DEVISE LANDS.—*Statute of Frauds*.—*Lost or Destroyed Will*.—*Evidence of*.—*Partition*.—In an action for parti-

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tion of the lands of an intestate, a defendant answered claiming title to the whole of the lands by virtue of the performance of a verbal contract made between such intestate and the defendant, whereby the former put the latter in possession of the lands, and agreed to convey or devise the same to him, in consideration of the promise of the latter to board and care for the former during life.

*Held*, that such contract is not within the statute of frauds.

*Held*, also, that evidence of a will prepared by the intestate, devising part only of such lands to the defendant, spoken of by the witnesses as lost or destroyed, and the existence of which at and since the intestate's decease was unknown, was incompetent and immaterial.

From the Harrison Circuit Court.

*G. W. Denbo and W. A. Porter*, for appellants.

*W. F. Jones, S. J. Wright, L. Jordan and H. Jordan*, for appellees.

NIBLACK, J.—This was an action for the partition of two forty-acre tracts of land in Harrison county, by Mary Mauck and her husband, George Mauck, against Lavisa Melton and her husband, Daniel Melton, Daniel T. Gilmore and Mollie Gilmore.

The complaint alleged, that Mary Gilmore, who was the mother of the said Mary and Lavisa and the grandmother of the said Daniel T. Gilmore and Mollie Gilmore, had died intestate, seized in fee-simple of the lands of which partition was demanded.

Mrs. Melton and her husband answered in three paragraphs:

1. In general denial.
2. Setting up a verbal contract, by which, in consideration that they would board and care for the said Mary Gilmore during her life, and attend to all her proper wants, she was to convey said lands to the defendant Lavisa Melton, or devise the same to her by will, and averring that the said Mary Gilmore had put them in possession of said lands under said contract, that they had boarded, cared for and attended to the said Mary Gilmore, in a suitable manner, from that time until the time of her

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death, a period of near six years. Wherefore they averred, that the said Lavisa was the owner of said lands in her own right.

3. Setting up a contract similar to that described in the second paragraph, and adding that said defendants had made valuable and lasting improvements on said lands, under said contract. Also praying, that, if partition of said lands should be made, an additional portion of the same should be set apart to the said Lavisa, to compensate them for their improvements.

The plaintiffs replied in denial of the second and third paragraphs of the answer, and the cause was submitted to the court for trial.

The court found that the said Lavisa was the owner in her own right of the lands in dispute, and, refusing partition, rendered judgment against the plaintiffs for costs.

The plaintiffs, by a motion for a new trial, raised the question of the sufficiency of the evidence to sustain the finding, and that is the only question to which our attention has been invited here.

It has been decided by this court, and we think correctly, that a contract such as that set up in the second paragraph of the answer is not within the statute of frauds, and may be specifically enforced by appropriate proceedings. *Moreland v. Lemasters*, 4 Blackf. 383; *Stater v. Hill*, 10 Ind. 176; *Fall v. Hazelrigg*, 45 Ind. 576; *Erost v. Tarr*, 53 Ind. 390; *Irwin v. The State, ex rel. Spoor*, 54 Ind. 137; *Harper v. Harper*, 57 Ind. 547.

There was evidence upon the trial showing that after Melton and wife went into the possession of the lands described in the complaint, Mrs. Gilmore executed a will disposing of her entire estate, and tending to show that by such will she devised and bequeathed at least the greater portion of her property, including said lands, to Mrs. Melton.

The appellants insist, that, under such circumstances, Melton and wife ought to have claimed under Mrs. Gilmore's will, and not under the verbal contract set up in the second paragraph of their answer, which was, in legal effect, superseded by the execution of the will.

This will was, upon the trial, however, spoken of and treated as a lost or destroyed will. No witness then claimed to have either seen or to have known of the actual existence of this will since Mrs. Gilmore's death, or for several years previously thereto, although it appeared that diligent search for it had been made, and there was no pretence that such will had ever been proved and established as a lost or destroyed will. In this condition of affairs regarding the will, no valid claim to any portion of Mrs. Gilmore's estate could have been set up under it or supported by it.

A lost or destroyed will can not be used as evidence to sustain, or otherwise affect, the title to property devised or bequeathed by it, until it has been proved and established in the mode prescribed by law. See act concerning wills, 2 R. S. 1876, p. 570.

We are therefore of the opinion, that all the testimony introduced concerning the execution and contents of the will, referred to as above, was both irrelevant and immaterial.

While there was considerable conflict in the evidence, we think that so much of it as was relevant and material fairly sustains the finding of the court, and we see no reason for a reversal of the judgment.

The judgment is affirmed, at the costs of the appellants.

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Richards v. O'Brien et ux.

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## RICHARDS v. O'BRIEN ET UX.

**MARRIED WOMAN.—Promissory Note.—Contract.—Stipulation to Pay, out of Separate Property.**—A promissory note or parol contract by a married woman, stipulating for the payment, out of her separate property, of the price of a piano purchased by her, can not be enforced against either her or the rents of her separate property.

From the Benton Circuit Court.

*D. E. Straight* and *U. Z. Wiley*, for appellant.

*T. L. Merrick* and *H. S. Travis*, for appellees.

PERKINS, J.—We take the following statement of the case from the brief of appellant :

“The question in this cause is, whether the rents and profits of a married woman’s separate estate can be subjected to the payment of her note, where, by the note itself, she agreed to pay, from her own separate property, the amount stated therein.

“The facts presented by the record are as follows : Action was brought by the appellant, against appellees, upon a note executed by Mary O’Brien, and purporting to be endorsed by John O’Brien, in which Mary O’Brien promised to pay, ‘out of her own separate property,’ etc.; also a balance of ten dollars, unpaid purchase-money of the article purchased, not included in the note.

“The complaint, in the nature of a bill in equity, in substance alleges that Mary O’Brien, at the time of the execution of the note, was and still is a married woman, the wife of her codefendant, John O’Brien; that she was and still is the owner, in her own right, of a large amount of real estate and personal property, describing the real estate and giving its estimated value, from which large amounts of rents and profits were received annually; that she owned a considerable amount of personal property, arising from the rents and profits of her said farm; that John O’Brien was not then, nor is he at the present time,

the owner of any property that could be subjected to the payment of debts, and in fact was insolvent; that Mary O'Brien, as becoming her station and circumstances in life, desired to purchase a piano for the use of herself and daughters; that complainant being informed in the premises, and relying upon the responsibility of Mary O'Brien and her promise to pay out of her own separate property, sold her a piano for \$450, \$50 of which was to be paid in a short time, same as cash down, and for the balance giving her two notes for \$200 each, dated December 10th, 1874, pledging and intending to bind and charge her separate property to the payment of the same, of one of which the following is a copy, to wit:

“‘\$200.

FOWLER, IND., Dec. 10th, 1874.

“‘One year after date I promise to pay to the order of E. D. Richards, out of my own separate property, two hundred dollars,’ etc. ‘MARY O'BRIEN.’

“In consideration of which note and the other note aforesaid, together with the fifty dollars to be paid in cash, complainant sold and delivered said piano to Mary O'Brien, for her especial use and benefit, etc.; that Mary O'Brien has paid \$40 upon the \$50 that was to be paid down, leaving a balance of \$10, which, together with the amount of the above note and interest, etc., making the amount now due and unpaid the sum of \$285, which amount said Mary O'Brien promised to pay out of her separate property, and in equity and good conscience ought to be paid by her; that Mary O'Brien now is the owner of the real estate aforesaid, and a large amount of corn raised upon said premises, to wit, 2,500 bushels, as well as a large amount of other personal property aforesaid. Wherefore complainant claims \$300, and demands judgment, and that an account be taken to ascertain the amount; and that the court order and decree that the separate property of Mary O'Brien, arising from the rents and profits of her separate estate, or



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Whitecotton *et al.* v. Landon *et al.*

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so much thereof as may be necessary, be subjected to the payment, etc., and in case of failure, etc., that a receiver be appointed to apply the profits," etc.

"Defendants demurred separately to the complaint, on the ground of not stating facts sufficient, etc. Demurrer sustained as to Mary O'Brien, to which ruling the plaintiff excepts. Judgment on the demurrer against plaintiff.

"Appellant assigns as error the sustaining, by the court below, of the demurrer of Mary O'Brien to plaintiff's complaint."

The contract sued on in this case was one that could not be enforced against Mary O'Brien, nor be made a charge upon her separate estate. *The American Insurance Co. v. Avery*, 60 Ind. 566. This case is directly in point. *Behler v. Weyburn*, 59 Ind. 143.

The judgment is affirmed, with costs.

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WHITECOTTON ET AL. v. LANDON ET AL.

PRACTICE.—*Grounds of Objection to Evidence.*—An objection to the admission of evidence introduced should clearly point out to the court below the grounds of the objection.

From the Blackford Circuit Court.

*W. A. Bonham* and *J. Cantwell*, for appellants.

*J. Brownlee* and *H. Brownlee*, for appellees.

BIDDLE, J.—Complaint on three promissory notes secured by mortgage. Prayer for judgment on the notes, and foreclosure of the mortgage. Answer, general denial. Trial by the court, finding and judgment for appellees. Appeal.

The appellants complain, in this court, because the court below admitted certain notes in evidence over their objections, but what their objections were does not seem to have

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been pointed out to the court below, and we see none. The counsel for the appellants say that the notes introduced were not the notes described in the complaint, but the bill of exceptions says that "The plaintiffs, in order to sustain their cause, introduced the following evidence, to wit, the three original notes mentioned in complaint, as follows." Here the notes are set out. The mortgage offered and introduced as evidence over the objections of the appellants corresponds with the mortgage described in the complaint. No objections to it were pointed out to the court below, and this court has not been able to find any.

These are all the questions discussed in the appellants' brief. Neither are well taken.

The judgment is affirmed, at the costs of the appellants, with four per cent. damages.

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LOWRY v. THE STATE, EX REL. HULL.

**GUARDIAN AND WARD.—Conversion.**—A guardian who uses money belonging to his ward in his own business, or who, for his own use, sells, barter or assigns a chose in action belonging to his ward, is liable on his bond, for conversion.

**SAME.—Conversion of Proceeds of Real Estate.—Liability.—Bond.**—Where the assets converted by a guardian are the proceeds of a sale made by him, by order of court, of his ward's real estate, the action should be brought on the additional bond executed in the proceeding to sell the realty.

**SAME.—New Bond.—Surety.**—The liability of a surety on a new bond, executed by a guardian after a conversion of his ward's estate, is only prospective.

**SAME.—Bond Executed Without Assets on Hand.—Report.—Estoppel.—Cases Overruled.**—Where, on the execution of such new bond, the guardian, as such, has in fact no assets, such surety is not liable, though the guardian then and subsequently charge himself, in his reports to the court, as with assets on hand. *The State, ex rel., etc., v. Grammer*, 29 Ind. 580, *Bagot v.*

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182	83

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*The State, ex rel., etc.*, 38 Ind. 262, *Wilmer v. The State, ex rel., etc.*, 44 Ind. 223, and *The State, ex rel., etc., v. Prather*, 44 Ind. 287, are overruled on this point.

From the Marion Circuit Court.

*L. M. Campbell, E. F. Ritter, L. C. Walker and L. Ritter*, for appellant.

*D. V. Burns, H Burns, B. F. Claypool and J. H. Claypool*, for appellee.

NIBLACK, J.—This was an action by the State, on the relation of John W. Hull, guardian of Fannie Hull and Jennie Hull, minor heirs of Mary E. Hull, deceased, against Oscar H. Hull and William J. Lowry, on a guardian's bond.

The defendant Oscar H. Hull made default, and Lowry answered in general denial.

Issue being thus joined, the cause was submitted to the court for trial, and, at the request of the defendant Lowry, the court made a special finding of the facts. So much of the special finding as is material for our consideration here, with the conclusions of law thereon, was substantially as follows:

"On the 25th day of April, 1865, the defendant Oscar H. Hull was appointed by the court of common pleas of Hendricks county as the guardian of Fannie Hull and Jennie Hull, who are his own children, and who were aged respectively, at said date, five and three years, at which time the said guardian executed his bond in the penal sum of \$600.00, with one Oliver W. Hill as his surety. Under this appointment said guardian received \$50.00 worth of personal property belonging to his wards, consisting of household goods which had belonged to their mother, then deceased, and which has never been sold, but has been retained by him and used by said wards, and is now in his possession, and subject to the order and control of the present relator and guardian.

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"Afterward, at the May term, 1865, of the court of common pleas of Hendricks county, said guardian filed his petition in said court to sell the real estate of his wards, and was duly ordered and authorized to sell the same, at which time he executed a bond to the State of Indiana, in the penal sum of \$3,800, with William G. Parker as his security, conditioned for the faithful discharge of the duties of his trust according to law in that behalf, which bond was duly approved by the court, and on the same day said guardian reported to the court that he had sold, pursuant to the order of said court, the real estate of his wards, to William W. Irons, for the sum of \$1,648.14, \$500 of which was received in cash, and for the balance of which he took a note of the purchaser, without security, due December 25th, 1865; that of the \$500 received in cash said guardian appropriated to his own use \$300, at the time of its receipt, and used the \$200 remaining, for the benefit of his wards, for which he afterward filed vouchers that were approved by the court.

"The note taken for the deferred payment on the real estate was traded and assigned by said guardian, before it became due, to William G. Parker, who was his surety, in part payment for an interest in a stock of goods which was bought by said guardian for his own use, and not for the benefit of his wards. The goods were afterward resold to said Parker, but were never paid for by him, he, said Parker, afterward becoming insolvent and dying so, being indebted to said guardian at the time of his death in the sum of \$3,100, which was reduced to a judgment and a decree of foreclosure of a mortgage in the Hendricks Circuit Court, in favor of said defendant Hull and against said William G. Parker, on the 23d day of May, 1878, which judgment remains unpaid, and is of no value, the mortgaged premises being at the time encumbered to their full value, by older and paramount liens.

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"The court further finds that said guardian received no other money or property of his wards, from any other source than as above set out.

"On the 3d day of January, 1867, Oliver W. Hill, security on the original guardian's bond, filed his application to be released, and on the 22d day of January, 1867, said guardian, Oscar H. Hull, executed another bond, with William G. Parker as his security, in the penal sum of \$4,500, conditioned for the faithful discharge of his duties as such guardian.

"On the 18th day of January, 1870, said Oscar H. Hull and said Lowry executed the bond now sued upon, in the penal sum of \$4,000. This was done voluntarily, without any order of court, either directing it to be done or releasing the security, William G. Parker, on the bond previously given.

"On the 19th day of January, 1870, said guardian made a report to the proper court, in which he acknowledged that he was indebted to his wards in the sum of \$2,734.53, which report was approved by the court, and which was placed on the files and remains there still. On the 19th day of January, 1872, said Oscar H. Hull again reported to the proper court that he was indebted to his wards in the sum of \$2,982.53. On the 1st day of May, 1874, said guardian filed in the Hendricks Circuit Court his report No. 4, in which he acknowledged himself to be indebted to his wards in the sum of \$3,557.67. .

"At the time of making these several reports, said guardian had not, in fact, any money of his wards' in his hands or under his control, nor has he received, nor did he receive, any money or property of said wards' subsequent to the execution of the bond by said guardian and William J. Lowry, on the 18th day of January, 1870; \* \* \* that said guardian was able, and did possess sufficient property or means, to properly maintain and support said wards with-

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out the use of their own means ; that, upon a full accounting between said guardian and his said wards at this date, there would be a balance due said wards, from said guardian, of \$4,761.93 ; that, on the 23d day of January, 1877, said Oscar H. Hull tendered his resignation, as guardian, to the said Hendricks Circuit Court, which was accepted, and the relator, John W. Hull, was appointed his successor in said trust. \* \* \*

“ It is further found that said Hull, on the day he gave the bond sued on, and before it was given, to wit, January 19th, 1870, made a settlement with the proper court, in which he accounted for, and acknowledged to be in his hands, and owing to his said wards, the sum of \$2,684.53 ; that afterward, to wit, on the 25th day of January, 1872, he made a further settlement, charging himself with the sum of \$2,932.53, due to his said wards, and, on further settlement with said court, made April 18th, 1874, he acknowledged his indebtedness to said wards to be \$3,557.67.

“ These are the facts, as I find them from the evidence ; and the conclusions of law to which I come from them are, that the plaintiff is entitled to recover from the defendant Oscar H. Hull the said sum of forty-seven hundred and sixty-one dollars and ninety-three cents, and from the said defendant Lowry the sum of four thousand dollars, and judgment is therefore accordingly rendered. And the defendant Lowry now excepts to the conclusions of law drawn by the court from the facts found.”

Over the exceptions of Lowry, as to the conclusions of law drawn by the court as above set forth, the court rendered a judgment against the defendant Hull for the sum of four thousand seven hundred and sixty-one dollars and ninety-three cents, and against the said Lowry for the sum of four thousand dollars, with costs in both cases.

Lowry has appealed to this court, and assigned error

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upon the conclusions of law drawn by the court below from the facts found, as above stated.

There is some confusion in the statement of the facts as set out in the special finding, owing apparently to a want of care in the attempted repetition of some of the facts thus set out, but enough is distinctly shown by the special finding to make it evident that the defendant Hull, during the year 1865, converted to his own use the entire proceeds of the sale of his wards' real estate, except two hundred dollars paid out by him for the benefit of said wards, upon proper vouchers afterward approved by the court.

The use by the guardian of the money of his wards in his own business is a conversion of such money to his own use, for which he becomes liable on his bond. The selling, bartering or assigning away the property, including choses in action, of the wards, by the guardian, for his own use, is equally a conversion of the assets of his wards, for which he is also liable on his bond. *The State, ex rel., etc., v. Sanders*, 62 Ind. 562; and *Bevis v. Heflin*, 63 Ind. 129.

The assets converted in this case, being the proceeds of real estate, it was only the additional bond given to secure such proceeds that was forfeited by such conversion. *Colburn v. The State, ex rel., etc.*, 47 Ind. 310; *Shook v. The State, ex rel., etc.*, 53 Ind. 403; *Hunt v. The State, ex rel., etc.*, 53 Ind. 321, 325.

Where a guardian has converted the assets of his wards to his own use, redress must be sought, if on any bond, upon his bond in force at the time of the conversion. *The State, ex rel., etc., v. Sanders, supra.*

Where a new bond is given in place of the original bond, the liability on such new bond is prospective only. *The State, ex rel., etc., v. Page*, 63 Ind. 209.

It is also shown by the special finding, that, at the time the bond sued on was executed, the defendant Hull had no

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assets in his hands belonging to his wards, and that no such assets came afterward into his hands. But it is objected that Lowry is estopped from going behind the several reports made by the defendant Hull, as guardian, and inquiring into the real condition, from time to time, of the assets which had come into his, said Hull's, hands, as such guardian, and this objection is apparently sustained by the cases of *The State, ex rel., etc., v. Grammer*, 29 Ind. 530, *Bagot v. The State, ex rel., etc.*, 33 Ind. 262, *Wilmer v. The State, ex rel., etc.*, 44 Ind. 223, and *The State, ex rel., etc., v. Prather*, 44 Ind. 287. But these cases are not, in our opinion, supported by the weight of authority, in their application to the question involved, and, upon full consideration, we have come to the conclusion, that so much of these cases as can be construed as sustaining the objection urged, as above, must be overruled.

Upon the facts shown by the special finding, we have no difficulty in deciding that the court erred in holding that a cause of action had been made out against Lowry, and in rendering judgment against him accordingly.

The judgment against the appellant, Lowry, is reversed, with costs, and the cause remanded, with instructions to the court below to render judgment in his favor upon its finding of the facts.

Petition for a rehearing overruled.

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SMITH ET UX. v. BRAND.

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**MORTGAGE.**—*Foreclosure of Absolute Deed Intended as Mortgage.*—*Finding and Judgment.*—A complaint for foreclosure alleged the execution to the plaintiff, by the defendants, of a warranty deed for certain lands, as security for the payment of a debt; that the plaintiff had verbally agreed to



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reconvey the lands on payment of the debt ; and that the debt was due and unpaid. The court, upon trial, found "that the equity of redemption of the defendants to the lands \* be foreclosed, \* and that the deed \* be absolute," and judgment was rendered for foreclosure, and that the deed "be, and the same is now declared, absolute."

*Held*, that the finding and judgment should have been for the amount due, that the deed was only a mortgage, and for foreclosure and sale.

From the Boone Circuit Court.

*H. C. Wills*, for appellants.

*C. S. Wesner*, for appellee.

Howe, C. J.—In this action the appellee sued the appellants, in a complaint of one paragraph, in which he alleged, in substance, that, on the 29th day of November, 1873, the appellants became indebted to the appellee in the sum of one thousand and eighty-three dollars, which they agreed and promised to pay him on or before the 29th day of November, 1874 ; that, to secure the payment of the said sum of money, the appellants on said 29th day of November, 1873, by their warranty deed of that date, a copy of which was filed with the complaint, conveyed to the appellee, in fee-simple, the real estate in Boone county, Indiana, particularly described in said complaint ; that it was verbally agreed, by and between the said parties to said deed, that, if the appellants should repay to the appellee the said sum of money within the time prescribed, he, the appellee, would reconvey the said real estate to the appellants, or to said Cynthia A. Smith, and that the said sum of money was long past due and wholly unpaid. Wherefore the appellee demanded judgment for fifteen hundred dollars, and for the foreclosure of the appellants' equity of redemption, and for the sale of said real estate as other lands are sold on execution, and for other proper relief.

To this complaint the appellants answered, by a general denial thereof.

The cause was tried by the court, without a jury, "and, after hearing the evidence adduced, the court finds for the

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plaintiff, and that the equity of redemption of the defendants, to the lands described in the plaintiff's complaint herein, be foreclosed against said defendants, and that the deed from the defendants to the plaintiff for said lands be absolute." Upon this finding the court rendered judgment, foreclosing and barring the appellants' equity of redemption in the real estate, and that the deed from the appellants to the appellee "be, and the same is now declared, absolute."

The appellants' motion for a new trial was overruled by the court, and to this ruling they excepted, and filed their bill of exceptions.

In this court, the appellants have assigned, as error, the decision of the circuit court in overruling their motion for a new trial. The causes for such new trial, assigned in their motion therefor, were, that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law.

The evidence, as agreed to by the parties, is in the record by a proper bill of exceptions. This evidence fully and clearly established the following facts: That, on the 29th day of November, 1873, the appellants borrowed one thousand and eighty-three dollars from the appellee, which sum of money was to be repaid on or before the 29th day of November, 1874; that, to secure the payment of said sum of money, the appellants conveyed to the appellee, by warranty deed, the real estate in Boone county, Indiana, described in appellee's complaint; that, at the time the said deed was executed, it was agreed and understood, by and between the said parties, that, if the appellants repaid to the appellee his money and interest on the same, he should reconvey said real estate to the appellants; and that the appellants had failed to pay the appellee his money and interest, according to the agreement.

Upon the foregoing facts, it is very clear, we think, that

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the warranty deed from the appellants to the appellee, though absolute on its face, was, in fact and in law, and was intended to be, only a mortgage to secure the repayment of the sum of money borrowed by the appellants from the appellee; and the rule is, "once a mortgage, always a mortgage." *Wheeler v. Ruston*, 19 Ind. 334; *Smith v. Parks*, 22 Ind. 59; *Crane v. Buchanan*, 29 Ind. 570; and *Graham v. Graham*, 55 Ind. 23.

In his complaint in this action, the appellee admitted in express terms, that his warranty deed was merely a mortgage to secure the repayment to him of the sum of money borrowed by the appellants, and he demanded judgment for the money due him, and for the foreclosure of such mortgage, and the sale of the mortgaged property, etc. In its finding, the court below found, at least impliedly, that the deed in question was only a mortgage; for the court found, "that the equity of redemption of the defendants, to the lands described in the plaintiff's complaint herein, be foreclosed against said defendants." It is clear, that, unless the deed to the appellee was a mortgage, the appellants would not have any equity of redemption in the lands conveyed, to be barred and foreclosed.

The error of the circuit court, in its finding in this case, is this: That the court failed to find the amount due the appellee from the appellants, on the loan to the latter by the former, made on the 29th day of November, 1873; that the deed executed by the appellants to the appellee, though absolute on its face, was, in fact and in legal effect, only a mortgage to secure the payment of the amount due on said loan, with interest and costs; that the real estate described in said deed should be sold as other lands are sold on execution, to satisfy the said amount so due as aforesaid, with interest and costs; and that, upon such sale, the equity of redemption of the appellants, and of each of them, in and to the said real estate, should be and ought to be forever barred and foreclosed.

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In section 633 of the practice act, it is provided as follows: "In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action." 2 R. S. 1876, p. 261.

Again, section 379 of the code of practice reads as follows: "In the foreclosure of a mortgage, the sale of the mortgaged property shall in all cases be ordered." 2 R. S. 1876, p. 188.

These statutory provisions, it seems to us, are decisive of the question now under consideration, and clearly lead us to the conclusion, that the finding of the court in this case was not sustained by sufficient evidence, and was contrary to law.

The court erred in overruling the appellants' motion for a new trial.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the appellants' motion for a new trial, and for further proceedings in accordance with this opinion.

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BUCK v. SMILEY.

**PRINCIPAL AND SURETY.**—*Extension of Payment of One, on Promise to Pay Another, Promissory Note.*—*Answer.*—In an action by the payee, against the makers, on a promissory note, one of the defendants answered that he was merely surety for his co maker, as the plaintiff well knew when the note was executed; and that, without the knowledge or consent of the surety, the payee had verbally extended the time of payment of the note, for a specified period, in consideration of the verbal promise of the principal to pay, before its maturity, a promissory note executed by him alone to the payee, which would not mature within the time of the extension of the note in suit.

**Held,** on demurrer, that the agreement of extension was valid, and that the answer is sufficient.

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Buck v. Smiley.

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From the Rush Circuit Court.

*G. B. Sleeth and J. W. Study*, for appellant.

*B. L. Smith*, for appellee.

Howk, C. J.—This was a suit by the appellee, against the appellant and one Jacob B. Day, as defendants, for the recovery of the amount alleged to be due on two promissory notes.

The complaint was in two paragraphs, each counting on a separate note, executed by said Jacob B. Day and the appellant, and payable to the appellee.

The defendant Day separately answered, setting up matter of set-off as a partial defence to the action; to which separate answer the appellee replied by a general denial. The appellant separately answered in a single paragraph, to which the appellee demurred, upon the ground that it did not state facts sufficient to constitute a defence to his action. This demurrer was sustained by the court, and to this decision the appellant excepted, and refused to answer further.

The cause was tried by the court, and a finding made for the appellee, against both defendants; and, "by agreement of parties," it was further found by the court that the appellant was surety on the notes in suit.

Judgment was then rendered by the court upon and in accordance with its finding, from which said judgment this appeal is now here prosecuted.

In this court, the appellant has assigned the following alleged errors:

1. The circuit court erred in sustaining the appellee's demurrer to the appellant's answer; and,
2. The circuit court erred in rendering judgment against the appellant and in favor of the appellee.

Upon these alleged errors, the only question for our decision is this: Were the facts stated in the appellant's an-

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swer sufficient to constitute a defence, in his behalf, to the appellee's action ?

In his answer, the appellant admitted the execution of the notes in suit, but he said that he signed the same as the surety for his codefendant, Day, who was the principal in said notes, and in no other manner whatever, which was well known to the appellee at the time, and that he had no other interest in said notes than as the security of said Day ; that, on the 20th day of September, 1875, the appellee proposed to the defendant Day, without the appellant's knowledge or consent, that he, the appellee, would extend the time of payment of the notes sued on, for a period of ninety days from the said 20th day of September, 1875, if he, the said Day, would agree and promise to pay the appellee another note, which the appellee held against said Day, which would not fall due until the 25th day of December, 1875, and would not be due in ninety days from said 20th day of September, 1875, which proposition was accepted by said Day, and which said agreement was entered into then and there by the appellee and said Day, whereby it was agreed, in consideration of the promise of the payment of the note not due at the same time of the payment of the notes in suit, that the time for the payment of the notes sued on should be extended for a period of ninety days from the 20th day of September, 1875, and that, in pursuance of said agreement, the time of the payment of the notes in suit was extended for a period of ninety days, which contract and agreement were made and entered into without the appellant's knowledge or consent. Wherefore, and by reason of the facts stated, the appellant said that he was not liable on said notes, and that he was released as surety thereon, and he prayed judgment for costs, and for all other proper relief.

It is very clear, we think, that this answer stated facts.

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sufficient to constitute a good defence to the appellee's action. It was alleged therein, that the appellant was the surety only of his codefendant, Day, in the notes in suit, and that this fact was well known to the appellee, the payee of said notes, and that the appellee, without the appellant's knowledge or consent, upon a valuable consideration, extended the time of the payment of said notes for a period of ninety days from the 20th day of September, 1875. We say that this extension for a fixed period was made upon a valuable consideration, because it can not be doubted that the promise of the defendant Day, to pay his other note to the appellee, before its maturity, was a valuable consideration, sufficient to sustain the appellee's contract for such extension of time. The promises of the appellee and the defendant Day, stated in the appellant's answer, were mutual promises. The appellee promised to extend the time of payment of the notes sued on, for the fixed period of ninety days, in consideration of Day's promise to pay his other note before its maturity; and Day's promise to pay such other note before its maturity was made in consideration of said extension of the time of payment of the notes in suit. Each of said promises was a sufficient consideration for the other promise; and each promise was therefore valid and binding upon the promisor, and could have been enforced by the promisee. By his contract, the appellee, the payee of the notes sued on, was legally bound and restrained from any action or suit at law for the recovery of said notes, for a period of ninety days from the date of said contract; and this contract was made by the appellee with the principal in said notes, upon a new and sufficient consideration, and without the knowledge or consent of the appellant, the surety in said notes. These are the facts stated in the appellant's answer, and if they are sustained by sufficient evidence, they will constitute a complete bar to the appellee's suit against the appellant, in this action.

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It must be regarded as settled law in this State, that an agreement between the payee or holder of a note and the principal therein, for an extension of the time of payment for a fixed and definite period, made without the knowledge or consent of the surety in the note, and founded upon a new consideration, will discharge the surety from any liability on such note. *Meniffee v. Clark*, 35 Ind. 304; *Jarvis v. Hyatt*, 43 Ind. 163; *Hamilton v. Winterrowd*, 43 Ind. 393, 398 and 401; *Huff v. Cole*, 45 Ind. 300; *White v. Whitney*, 51 Ind. 124; *Bucklen v. Huff*, 53 Ind. 474.

The court erred, we think, in sustaining the appellee's demurrer to the appellant's answer in this case.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to overrule the demurrer to the appellant's answer, and for further proceedings in accordance with this opinion.

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FISHER v. THE STATE.

**CRIMINAL LAW.—*Voluntary Intoxication.***—Mental incapacity, produced by voluntary intoxication, existing only temporarily, is no defence to a prosecution for a crime committed by a person while he is so intoxicated and mentally incapable.

**SAME.—*Insanity Produced by Disease Resulting from Habitual Intoxication.***—Insanity resulting from the habit of intoxication which, though voluntary, has been long continued, and has produced disease which has so perverted or destroyed the mental faculties as to render the person so afflicted incapable, by reason of such disease, of acting from motive, or of distinguishing right from wrong, when sober, is a defence to a prosecution for a crime committed by him while in such condition.

**SAME.—*Weight of Evidence.—Supreme Court.***—The Supreme Court, on appeal, will not disturb a verdict against the defendant in such case, on the mere weight of conflicting evidence as to his mental condition.



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**SAME.—Newly-Discovered Evidence.—New Trial.**—Newly-discovered evidence is not sufficient ground for a new trial, unless it comes within the rule laid down in clause 7 of section 352, p. 181, and in section 142, p. 409, 2 R. S. 1876.

**SAME.—Arrest of Judgment.**—The judgment in a criminal prosecution may be arrested for either of the causes stated in section 144, 2 R. S. 1876, p. 409.

From the Clinton Circuit Court.

*A. E. Paige, S. O. Bayless and J. U. Gorman*, for appellant.

*T. W. Woollen*, Attorney General, for the State.

**PERKINS, J.**—An indictment was duly returned, charging that Elias Fisher, who is the appellant, "on the 27th day of November, 1878, at the county and State aforesaid, did then and there unlawfully and feloniously steal, take and carry away ten pieces of silver money, coinage of the United States of America, of the denomination and value of fifty cents each," etc.

The defendant was arraigned and pleaded not guilty. He was tried by a jury, found guilty, and his punishment was fixed at imprisonment in the state-prison for one year, to which was added a fine of twenty-five dollars, disfranchisement, etc.

A motion for a new trial, for the reasons that the verdict was not sustained by the evidence, and that material evidence had been discovered since the trial, was overruled, and judgment and sentence pronounced.

It is assigned for error in this court:

1. That the court erred in overruling the motion for a new trial; and,
2. That the court erred in overruling the motion in arrest of judgment.

The grounds specified in the motion for a new trial, as has been stated, were, that the verdict was not sustained by the evidence given, and newly-discovered evidence.

We can not say that the evidence did not establish the larceny beyond a reasonable doubt, if the appellant

was mentally capable of the commission of the crime. The defence mainly relied upon, on the trial, was mental incompetency, arising from voluntary drunkenness. The evidence in the cause touching the mental condition of the appellant, defendant below, was as follows; but, before copying it, we may state, that, on the 27th day of November, 1878, the day of the commission of the alleged larceny, the appellant was very drunk; he perpetrated the act charged as the crime for which he is indicted, while he was actually drunk. We proceed to copy the evidence:

"The defendant, to sustain his defence to the charge contained in the indictment in said cause, introduced the following evidence, viz.:

"Charles Sipes testified: 'My name is Charles Sipes; I live in Frankfort; have lived here forty years. I have known the defendant since his birth; I have seen him every day for three years. I don't know to have seen him sober for eighteen months past, except for a few weeks. Drink makes him crazy. He is that way nearly all the time. I have seen him frequently, during the past two years, in that same way, and several times in the last year. His drunken sprees would last for a week or more. He would be wandering about doing nothing. I have talked with him frequently. When drunk, he would never talk with any sense. Have seen him crying. From what I have stated, he was, I think, of unsound mind, and I think he was in the same condition on the 27th of November last.'

"On cross-examination he said: 'I have my opinion from the acts of his life, and his every day life, as I have stated. I saw him several times during the last summer. I was at work in the country last summer and came home frequently, and every time I saw him he was drunk. I was in town two-thirds of my time for the last six months. He was drunk nearly every time I saw him.'

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"Noah T. Catterlin testified: 'I have lived in Frankfort forty-eight years. I have known the defendant since he was a child. During the past three years I have seen him nearly every day, sometimes oftener. He is in the habit of getting drunk. Except a short time when he worked for me, he has been drinking and spreeing around all the time. He was hardly ever sober. When he is drunk he is crazy, and don't know any thing. He is drunk so much that his mind is nearly gone. He will quarrel with his best friends. I remember one occasion, I think in October, last fall, he was drunk and had a quarrel in front of my store. He was crazy, and no one could do any thing with him. Have seen him often during the last six months, and nearly every time I saw him he was under the influence of liquor, and drunk. From the facts I have stated, I think he was of unsound mind on the 27th of last November, and for several days before and after that date.'

"On cross-examination the witness said: 'He has no mind of his own, no power to resist the temptation to drink. When he worked for me, after he got the whiskey out of him, he was a good boy, perfectly honest, and a good boy to work. When drinking, or drunk, he does not know right from wrong. He is all right when sober—after he has been sober for a week or so—after he gets the whiskey out of his system.'

"Joseph W. Aughe testified: 'I know the defendant, and have known him for a number of years; have seen him nearly every day for the past year; do not know of him doing any thing around. He is in the habit of getting intoxicated; would get drunk any time when he could get whiskey; do not know whether he was insane or not.'

"Noah T. Fisher testified: 'I am a brother of the defendant. I have seen him nearly every day for the two years last past. He has been doing nothing, except for a short time when he worked for grandfather, but drinking. He

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would be drunk all the week, for several weeks at a time. He has been drunk most of the time for the past year. During this time his actions have attracted my attention several times. At one time he pawned my two-dollar hat for a drink. Several little articles about the house he took and pawned for a drink. One time when drunk, he took my overcoat, worth fourteen dollars, and tried to sell it for a drink. One time, when drunk, he tried to take a wash-stand, but could not move it. He was drunk on the 27th day of November last. From the facts I have stated, I do not think he was of sound mind on the 27th day of last November. He did not know right from wrong. He took my cap in the last fall.'

"George Maddux testified: 'I saw the defendant in Thomas Taylor's saloon,' (in which the testimony was that the alleged larceny was committed,) " 'at the time he was with Cohee and Good, on the 27th of November last. The defendant was drunk, and so was Cohee. The defendant did not know what he was doing, like the rest; were all drunk. Fisher was the drunkest. I thought that he went out at the front door, but may have been mistaken about that. Fisher went out first; said "I am going home to my mother's." I did not see him have any money that day; did not see him take any money, sack or bag from Cohee, or from the counter in Taylor's saloon, while there.'

"In rebutting, Nathan Fletcher testified that he knew the defendant, and thought he was, at that time, of sound mind.

"Samuel Aughe testified thus: 'I know the defendant, and saw him nearly every day last summer. I never saw him in any place of business; saw him on the street, standing around talking; saw him at work once, about two years ago. I think he is of sound mind now. I know the defendant, and have seen him often. I think he had good

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sense when he was not drinking. I have not talked with the defendant since May last.' ”

Such was the testimony touching the previous habits, and the mental and moral condition of the appellant, at the time of the commission of the alleged offence. None of it was objected to.

As a general proposition of law, mental incapacity, produced by voluntary intoxication, existing only temporarily, but at the time of the commission of the offence (in this case the larceny charged), is no excuse for the crime, nor a defence to a prosecution therefor. Bicknell Crim. Prac. 840. But where the habit of intoxication, though voluntary, has been long continued, and has produced disease, which has perverted or destroyed the mental faculties of the accused, so that he was incapable, at the time of the commission of the alleged crime, on account of the disease, of acting from motive, or distinguishing right from wrong when sober—in short, insane—he will not be held accountable for the act charged as a crime, committed while in such condition. *O'Herrin v. The State*, 14 Ind. 420; *Dawson v. The State*, 16 Ind. 428; *Bailey v. The State*, 26 Ind. 422; *Bradley v. The State*, 31 Ind. 492; *Cluck v. The State*, 40 Ind. 263.

There are cases which hold, that, in prosecutions for murder, drunkenness at the time may be shown as affecting the question of premeditation. 1 Archbold Crim. Prac. & Pl., by Pomeroy, p. 30.

As an enunciation, and an example of the application of the general doctrine of the law on this subject, we present the facts and opinion of the court in the leading case of *The United States v. Drew*, 5 Mason, 28:

“It appeared, that for a considerable time before the fatal act” (killing of Clark), “Drew had been in the habit of indulging himself in very gross and almost continual drunkenness; that about five days before it took place, he ordered

all the liquor on board, which was accordingly done. He soon afterward began to betray great restlessness, uneasiness, fretfulness and irritability; expressed his fear that the crew intended to murder him; and complained of persons, who were unseen, talking to him, and urging him to kill Clark; and his dread of so doing. He could not sleep, but was in almost constant motion during the day and night. The night before the act, he was more restless than usual, seemed to be in great fear, and said, that whenever he laid down there were persons threatening to kill him, if he did not kill the mate, etc. In short, he exhibited all the marked symptoms of the disease brought on by intemperance, called *delirium tremens*."

Opinion of the court delivered by Judge STORY:

"We are of opinion, that the indictment upon these admitted facts can not be maintained. The prisoner was unquestionably insane at the time of committing the offence. And the question made at the bar is, whether insanity, whose remote cause is habitual drunkenness, is, or is not, an excuse in a court of law for a homicide committed by the party, while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of opinion, that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason, which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct, to shelter himself from the legal consequences of such crime. But the crime must take place and be the immediate result of the fit of intoxication, and while it lasts; and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal in a moral

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point of view such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he can not be pronounced guilty of the offence. The law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes, which remotely produced it. Many species of insanity arise remotely from what in a moral view, is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, etc. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence."

In the case before us, the evidence satisfactorily proved that the appellant was intoxicated when he committed the offence with which he was charged in the indictment; that he was an habitual drunkard; but we can not say, after the verdict of the jury, that continuous excessive use of liquor had caused disease producing insanity or idiocy, as a mental condition of that permanency which would render him unaccountable for crime by him committed. We know, as matter of general knowledge, that such mental condition is not the necessary result of such drunkenness.

The application for a new trial, so far as it was based upon newly-discovered evidence, was not brought within the legal rule touching such applications for such cause. 2 R. S. 1876, p. 409; 2 R. S. 1876, p. 181, and notes.

Judgment in a criminal cause may be arrested for either of the following causes:

1. "That the grand jury who found the indictment had no legal authority to inquire into the offence charged, by

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reason of it not being within the jurisdiction of the court."

2. "That the facts stated do not constitute a public offence." 2 R. S. 1876, p. 409, sec. 144.

Neither of these grounds for arresting the judgment existed.

The judgment is affirmed, with costs.

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YOUNT v. THE STATE.

**CRIMINAL LAW.—Forgery.—Indictment.**—An indictment for the forgery of a promissory note payable to and endorsed by one "E. J. Schweitzer," as appeared by copies of the note and endorsement set out in the indictment, alleged that the forgery was committed by the defendant "with intent to defraud one Emily J. Schweitzer."

*Held*, that the indictment is insufficient.

**SAME.—Verdict.—Acquittal.**—A verdict of guilty as charged in one of two counts in an indictment, alleging, respectively, the forgery of a promissory note, and the utterance of the same, is equivalent to an acquittal on the other count.

From the Montgomery Circuit Court.

*R. B. F. Peirce*, for appellant.

*T. W. Woollen*, Attorney General, for the State.

**NIBLACK, J.**—This was a prosecution for forgery. The indictment contained two counts. The first charged the forgery of a promissory note; the second the uttering and the publishing of the note thus forged.

The defendant entered separate motions to quash each count of the indictment, but his motions were both overruled.

The jury trying the cause found the defendant guilty as charged in the first count, and he was sentenced to pay a fine of one dollar, and to be imprisoned in the state-prison for the term of two years.

64	443
d161	671
64	443
166	217
d166	218



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The first count of the indictment, omitting some cancelled endorsements, and some immaterial memoranda upon the note set out in it, was as follows :

"The grand jurors of Montgomery county, in the State of Indiana, good and lawful men, duly and legally empanelled, sworn and charged in the Montgomery Circuit Court of said State, at the February term, for the year 1878, to inquire into felonies and certain misdemeanors in and for the body of said county of Montgomery, in the name and by the authority of the State of Indiana, on their oaths do present that one James Yount, late of said county, on the 13th day of November, A. D. 1876, at said county and State, did then and there unlawfully, feloniously and falsely forge and counterfeit a certain promissory note for the payment of money; which said forged and counterfeit note is as follows :

" ' No. ————— November 13th, 1876.

" 'Six months after date, we promise to pay to the order of E. J. Schweitzer, at Crawfordsville, Ind., one hundred and ninety-eight dollars; value received, without any relief whatever from valuation or appraisement laws; with interest at the rate of ten per cent. per annum after maturity. The drawers and endorsers severally waive presentment for payment, protest and notice of protest, and non-payment of this note.

" ' JAMES YOUNT,

" ' JAMES S. SHALLEY,

" ' CIRUS F. SHALLEY.' "

"The following endorsements appear on the back of said note, which said entries were made after the execution of said notes, to wit; ' \* \* \* E. J. Schweitzer, F. Schweitzer, \* \* \*,' with intent to defraud one Emily J. Schweitzer, contrary to the form of the statutes made and provided, and against the peace and dignity of the State of Indiana."

The appellant contends that this count of the indictment

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was bad, because its averments did not show that Emily J. Schweitzer, the person intended to be defrauded by the alleged forgery, had any interest in, or was in any manner apparently a party to, the forged note; that, in the absence of proper averments to that effect, it can not be inferred that E. J. Schweitzer, the alleged payee of the forged note, was the same person referred to as Emily J. Schweitzer, in describing the person the appellant had the intention to defraud; that, in these respects the count before us falls within the rule laid down in the case of *Shinn v. The State*, 57 Ind. 144.

We think the objections to this count, thus urged by the appellant, are well supported by the general rules of good pleading in criminal cases, and are sustained in principle by the case of *Shinn v. State*, referred to as above.

We are of the opinion, that, in cases of this kind, the averments in the indictment ought to show the person intended to be defrauded to have some apparent interest in, or connection with, the forged note, or to have stood in some relation to the note by which he might, as a natural result, be injuriously affected by the alleged forgery.

We have therefore come to the conclusion, that the court erred in refusing to quash the first count of the indictment, upon which the appellant was convicted.

As the appellant was, in legal effect, acquitted of the charge preferred against him in the second count, we need not consider the sufficiency of that count. *Bittings v. The State*, 56 Ind. 101.

The judgment is reversed, and the cause remanded, with instructions to the court below to sustain the motion to quash the first count of the indictment.

The clerk will give the proper notice for the return of the prisoner.

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 Lewis v. Owen et al.
 

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## LEWIS v. OWEN ET AL.

64	446
134	406
136	280
61	446
141	331
64	446
154	421
4156	827

CONVEYANCE.—*Defective Description.*—*Foreclosure of Mortgage.*—*Void Sheriff's Deed.*—*Reformation of.*—*Mistake.*—A sheriff's deed of conveyance of real estate, founded upon a sheriff's sale of the same on a decree of foreclosure of a mortgage, describing the premises as "*part of lot No.,*" etc, is void for uncertainty, and can not be reformed.

From the Putnam Circuit Court.

*D. C. Donnohue* and *H. H. Mathias*, for appellant.

*C. C. Matson* and *J. Birch*, for appellees.

BIDDLE, J.—Complaint on a special paragraph, for the possession of land, setting out the title by a sheriff's deed, derived through a judicial proceeding on the foreclosure of a mortgage, decree of sale, sale under the decree and deed to the purchaser.

Demurrer, for want of facts, sustained to the complaint.

The only questions made in the case are upon the sufficiency of the description of the premises in the deed to convey the title; and if not sufficient, whether the facts averred extrinsic to the deed will authorize its reformation, and thus obtain a sufficient description to convey the land, or whether they can be proved upon the trial, in support of the deed.

The description in the deed, of the property conveyed, is in the following words: "Part of lot No. 78, in the Eastern Enlargement to the Town (now City) of Greencastle, containing one-fourth ( $\frac{1}{4}$ ) of an acre, and bounded as follows, to wit: On the west side by a lot formerly owned by Robert Turner, on the north by a lot formerly owned by John H. Bellamy, and on the east by William Atherton, and on the south by Hanna street, in Putnam county, State of Indiana."

Deeds of conveyance, as to the description of the premises conveyed, must be construed liberally, and, in cases of this kind, will be upheld whenever the description is

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sufficient to direct the sheriff in the execution of a writ of possession, without the exercise of any other than executive powers; otherwise the deed must be held void for uncertainty. By the description before us, it would be impossible for the sheriff to find the premises by the face of his writ, and without the exercise of powers not granted to him as an officer. We think the deed set out in this case is void for uncertainty in the description of the premises. *Davis v. Cox*, 6 Ind. 481; *Porter v. Byrne*, 10 Ind. 146; *Howell v. Zerbee*, 26 Ind. 214; *Gano v. Aldridge*, 27 Ind. 294; *Key v. Ostrander*, 29 Ind. 1; *Nolte v. Libbert*, 34 Ind. 163; *White v. Hyatt*, 40 Ind. 385; *Struble v. Neighbert*, 41 Ind. 344.

Can a sheriff's deed be reformed in the description of the premises, or can the defects in the description be aided by extrinsic averments? We think not. To do so would be to change the effect of the proceedings and decree upon which it is founded. A final judgment of a court can not be affected in that way. Upon principle, and by authority, this question is well settled. *Mahan v. Reeve*, 6 Blackf. 215; *Munger v. Green*, 20 Ind. 38; *Rogers v. Abbott*, 37 Ind. 138; *Cochran v. Utt*, 42 Ind. 267; *Miller v. Kolb*, 47 Ind. 220.

The court committed no error in sustaining the demurrer to the complaint.

The judgment is affirmed, at the costs of the appellant.

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VANNOY v. THE STATE.

**LIQUOR LAW.**—*Sale Made after Granting, but Before Issuing, License.*—A prosecution for selling intoxicating liquor without license was submitted to the court for trial, upon an agreed statement of facts, substantially as follows, viz.: That the defendant, by his authorized agent, had made the alleged sale; that, prior thereto, upon a sufficient application and due notice

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Vannoy v. The State.

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thereof, the proper board of commissioners had granted him a license to sell intoxicating liquors, and he had filed, and procured the proper approval of, the bond required by law; that, without any intention to violate the law, he had neglected to pay his license fee and take out his license, until a time subsequent to the time such sale was made, but prior to the commencement of the prosecution; and that the sale was made within the period covered by the license.

*Held*, that, though the sale, when made, was unlawful, and one for which the defendant could then have been prosecuted, yet the payment of the license fee and issuing of the license shielded him from subsequent prosecution therefor.

From the Shelby Circuit Court.

*E. P. Ferris*, *A. Blair* and *W. W. Spencer*, for appellant.  
*T. W. Woollen*, Attorney General, and *L. J. Hackney*, Prosecuting Attorney, for the State.

*Howe*, C. J.—On the 2d day of January, 1879, the appellant was indicted by the grand jury of the Shelby Circuit Court. The indictment charged, that the appellant, “John W. Vannoy, late of said county, on or about the 1st day of December, A. D. 1878, at said county and State aforesaid, not being then and there licensed according to the laws of the State of Indiana, at the time in force, to sell or barter spirituous, vinous, malt, or other intoxicating liquors in quantities less than one quart at a time, did then and there unlawfully sell and barter to one George W. Isley intoxicating liquor in a quantity less than one quart at a time, to wit, two gills, at and for the price of ten cents, contrary to the form of the statute,” etc.

On arraignment, the appellant’s plea to said indictment was, that he was not guilty. Afterward, at the March term, 1879, of the court below, the cause was tried by the court, without a jury, upon an agreed statement of facts, in writing; and thereon the court found, that the appellant was guilty as charged in the indictment, and assessed his punishment at a fine in the sum of twenty-five dollars, to which finding he at the time excepted. His written

motion for a new trial was overruled, and to this decision he excepted, and filed his bill of exceptions, and judgment was rendered by the court on its finding. An appeal was taken to this court, and the appellant has here assigned, as error, the decision of the circuit court in overruling his motion for a new trial.

The question for our decision is this: Were the facts set out in the written agreement of the parties sufficient to sustain the finding and judgment of the court below? Omitting merely formal matters, we give the facts set out in the agreed statement of facts, in substance, as follows: "That the defendant, by his duly authorized agent and employee, acting with the knowledge and consent of the defendant, did, on the 2d day of December, A. D. 1878, at the county of Shelby, and State of Indiana, sell to one George W. Isley certain intoxicating liquor, in a quantity less than one quart at a time, to wit, two gills of whiskey, at and for the price and sum of ten cents; that, in making said sale, said defendant was not licensed, according to the laws of the State of Indiana, to sell or barter spirituous, vinous, malt or other intoxicating liquors, in quantities less than one quart at a time, other or further than in the manner, the circumstances, following: That said defendant had, according to law, published his notice of an intention to apply for a license at the June term, 1878, of the commissioners of Shelby county, Indiana, to sell intoxicating liquors in quantities less than one quart at a time, at the place where said sale above specified was made; that, at said term, he did make such application in due form of law, and, at the time of the filing thereof, did file a good and sufficient bond, in the manner and form prescribed by law, which was then approved by the county auditor of Shelby county, Indiana; that, in acting upon said application, said commissioners entered of record, upon the proper records of said county, an order, properly signed," to take effect June 11th, 1878, which or-

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der was set out at length, in the agreed statement of facts, and showed, in substance, that, on the day last named, before said commissioners, then in session, the appellant filed his application for a license to sell intoxicating liquor, in a quantity less than a quart at a time, for one year, with the privilege of allowing the same to be drank on the premises where sold, and satisfied the board that due and legal notice of the filing of said application had been given as required by law, and that said appellant was a man of good character, and fit to be trusted with such license, and that it was then ordered by said board, that the appellant was entitled to such license, for one year, to sell intoxicating liquors in a quantity less than a quart at a time, with the privilege of allowing the same to be drank on the premises, particularly described in said order, in the city of Shelbyville, Shelby county, Indiana, and that the auditor of said county, upon the appellant's filing of a good and sufficient bond in the sum of two thousand dollars, and the receipt of the treasurer of said county for one hundred dollars, should issue such license to the appellant; "that, upon said order, so made by said commissioners, the said defendant afterward, to wit, on the 17th day of December, A. D. 1878, paid into the treasury of said county of Shelby the sum of one hundred dollars, as a license fee for the sale of spirituous, vinous, and malt liquors, in quantities less than one quart at a time, for which sum the treasurer executed to said defendant a receipt, which said defendant afterward, on said 17th day of December, 1878, presented to the auditor of said county and received a license," issued in pursuance of the said order of the board of commissioners of said county, of the date of June 11th, 1878, a copy of which license was set out in said agreed statement of facts, which said license authorized the appellant, by its terms, to sell intoxicating liquors in a quantity less than one quart at a time, etc., for the term of one year from the 11th day

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of June, 1878, in accordance with the order, of that date, of the board of commissioners of said Shelby county; "and that John W. Vannoy, the defendant, had neglected to pay the money to the county treasurer, without any intention of violating the law, either in the sale aforesaid or the payment of the money, and that said indictment was found by the grand jury, and returned and filed in this court, on the 2d day of January, 1879, and not otherwise."

It will be seen from this agreed statement of facts, that, at the time the appellant was indicted in this case, he held a license duly and legally issued by the proper authority, which, by its express terms, permitted him to make the precise sale, at the precise time charged in the indictment. It is true, that, at the time of such sale, he did not hold such license; but it appeared that he had been granted such license on the 11th day of June, 1878, for the term of one year thereafter, he having then, and before that time, strictly and literally complied with all the requirements of the statute in such case made and provided, *except* the payment of the necessary fee for such license. It further appeared that he had neglected to pay the license fee, and take and receive his license, until after he had made the sale upon which the indictment was afterward predicated, "without any intention of violating the law, either in the sale aforesaid or the payment of the money."

The question for decision, therefore, may be thus stated: Conceding that the sale, upon which the appellant was indicted, was made without license, and was, at the time, an unlawful sale, could he be indicted and punished for such sale *after* he had received a license, issued in conformity with law and by the proper officer, which, by its terms, covered the precise time at which the sale was made, and expressly authorized him to sell intoxicating liquors in a quantity less than one quart, at the precise time of such sale? In other words, did not the subsequent payment and receipt



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of the license fee, and the subsequent issue to the appellant by competent authority, in conformity with law, of a license covering the time of the alleged offence, so far legalize the unlawful act, as to relieve him from the penalties prescribed by the statute in any prosecution for such offence, subsequent to the issue of such license? It seems very clear to us that the first of these questions must be answered in the negative, and that the last one must be answered in the affirmative. As we have seen, the appellant had strictly complied with the requirements of the statute, and the board of commissioners of his county having granted him a license, on the 11th day of June, 1878, for the term of one year, he had given bond to the State of Indiana, with freehold sureties approved by the county auditor, as required by law. There was nothing more for him to do, under the law, but to pay the county treasurer one hundred dollars, as a license fee, and get his license. He neglected to pay his license fee until the 17th day of December, 1878, more than six months after he was granted his license; and, in the meantime, to wit, on the 2d day of December, 1878, he made the sale upon which the indictment in this case was predicated. This sale, when made, was made by the appellant when he did not hold a license which authorized him to make such sale; and it was, therefore, at the time, an unlawful sale. If he had been prosecuted for this sale, before he obtained his license, he would have been liable perhaps, upon conviction, to the penalty imposed by the statute. But it seems to us, that, after he had paid his license fee and had obtained a license, in due course of law, which covered the day on which the sale was made, the sale which had been illegal, for the want of such license, was thereby legalized, and the offence was thereby pardoned, if the expression may be allowed, at least to the extent that he could not and ought not to be thereafter prosecuted or convicted therefor. The proper officers under

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the law having received his money, and having thereupon issued him a license which in terms authorized him to make the sale for which he was afterward indicted, we are clearly of the opinion that these facts, which were agreed to by the parties, operated as a complete bar to this prosecution, and entitled the appellant to a finding in his favor. The court below erred, we think, in overruling the appellant's motion for a new trial.

The appellant has also assigned, as error, that the indictment did not state facts sufficient to constitute a public offence, or to show a violation of any law of this State, or to sustain the judgment of the court below. These objections to the sufficiency of the indictment are made for the first time in this court, and therefore they are not entitled to as much consideration by us as they would have been if they had been presented to, and decided by, the circuit court. As we have reached the conclusion, upon full consideration, that, upon the agreed statement of facts in this case, the State was not entitled, under the law, to a finding and judgment against the appellant, we deem it unnecessary for us to spend our time and labor in any lengthy examination of the appellant's objections to the sufficiency of the indictment. We merely remark, that it seems to us the indictment was sufficient to withstand even a motion to quash it, made at the proper time and in the proper court.

The judgment is reversed, and the cause is remanded, with instructions to find for the appellant, upon the agreed statement of facts, and to render judgment accordingly in his favor.

NIDLACK, J., dissents.

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The Ohio and Mississippi R. W. Co. v. Hardy.

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## THE OHIO AND MISSISSIPPI RAILWAY CO. v. HARDY.

**APPEAL BOND.**—*Rule of Court Prohibiting Attorneys from Becoming Sureties on.*—*Contempt.*—*Appeal from Justice.*—On an appeal by a railroad company, from a judgment rendered by a justice of the peace, to the circuit court, the appeal bond was executed by the company's attorneys only, notwithstanding a rule of the latter court prohibiting attorneys "from being received as security in such cases."

*Held*, on motion to dismiss the appeal, that such attorneys, though probably liable for contempt of such rule, are liable on the bond, and that the bond is sufficient.

**SAME.**—*Approval of Bond by Justice.*—The transmission to the circuit court, by the justice, with the other papers in the cause, of an appeal bond filed therein with him, implies his approval thereof.

From the Scott Circuit Court.

*C. L. Jewett* and *S. S. Crowe*, for appellant.

**PERKINS, J.**—Suit commenced before a justice of the peace, by the appellee, against the appellant, to recover the value of a cow killed by the latter.

Judgment before the justice, for the appellee. Appeal to the circuit court.

In that court the appellee, plaintiff below, filed a motion, as follows :

"The plaintiff moves to dismiss the appeal in this case, because no appeal bond was filed before the justice, or approved by him.

"2. Because the paper among the files, purporting to be an appeal bond, is signed by Samuel S. Crowe and Charles L. Jewett, as security, and by no other persons, as securities; that said securities are and were the defendant's attorneys, and their being security is in violation of rule No. — of this court, which prohibits attorneys of this court from being received as security in such cases."

The motion was sustained, and the appeal dismissed. The defendant excepted, and saved his exception by a bill of exceptions. No copy of any rule of court appears in the record; and it does appear by the record, that an ap-

peal bond was filed with the justice, and transmitted to the circuit court with the papers in the case, which implies his approval of the bond. Nor was the simple fact, that the bond was signed as sureties by the attorneys of the appellant any ground for the dismissal of the appeal.

It was within the power of the court to make the rule in question. *Abbott v. Zeigler*, 9 Ind. 511. But, as it was simply a rule of the circuit court, and not the statute of the State, it would not necessarily be taken notice of as law, by persons, not members of the bar, practising in that court. Hence it would be unjust to such persons to punish them by dismissal of their causes on account of the improper conduct of such attorneys, though the attorneys might have exposed themselves to punishment for a contempt, by the court whose authority and rule they had knowingly disregarded.

In cases where it is not by statute, but only by rule of court, that attorneys are prohibited from becoming sureties, if attorneys violate such rule and become sureties the bonds or obligations into which they enter are not void, but are binding on the obligors. *Banter v. Levi*, 1 Chit. 713, and cases collected in a note. One of those cases is *Harper v. Tahourdin*, 6 M. & S. 383, in which it was argued, "that the privilege of an attorney was not a part of the common law, as there was no such officer originally by common law, for no person could at first appoint his attorney without leave granted under the great seal, till the statute of Merton, and that was confined only to particular courts." "*Per Curiam*. He" (the attorney) "is certainly liable upon his recognizance, whatever penalties he may be liable to for having acted against the rule of the court."

In *Weeks on Attorneys at Law*, 1878, p. 219, an American book, it is said: "The bail, however, can not be treated as a nullity, and an attorney, if he signs, is liable on his recognizance, notwithstanding the prohibition, though an infringement of the rule may subject him to penalties."

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Collier v. Waugh *et al.*

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In this case the attorneys did not ask to be released, and claim the privilege of exemption under the rules. Had they, it should not necessarily have been allowed.

Such being the law, it is plain that the court erred in dismissing the appeal in this case. The court might probably have allowed a substitution of sureties, but was not bound to.

The judgment is reversed, with costs; cause is remanded, with instructions to the court below to reinstate the appeal, and for further proceedings.

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COLLIER v. WAUGH ET AL.

**PROMISSORY NOTE.—Payable in Bank.—Action by Endorsee.—Answer.—Bribery of Prosecuting Attorney.**—In an action by an endorsee, against the maker, on a promissory note payable in bank, the latter answered alleging that the note was executed to the payee, who was a prosecuting attorney, solely to procure the dismissal of a criminal prosecution then pending, of which the payee had official charge; and that the plaintiff had taken an assignment of the note in suit, without consideration, and with notice of the facts alleged.

*Held*, on demurrer, that the answer is sufficient.

**SAME.—Alteration.**—An answer in such action, alleging the alteration of the note, after its execution, by increasing its principal without the knowledge or consent of the defendant, and that the plaintiff had notice thereof, and had taken an assignment of the note without consideration, is sufficient.

From the Boone Circuit Court.

*W. B. Walls*, for appellant.

**Howk, C. J.**—This was a suit by the appellant, as endorsee, against the appellees, as makers, of a promissory note for \$125, dated November 7th, 1874, payable sixty days after date to the order of William B. Walls, at the First National Bank of Lebanon, Ind., and endorsed by said Walls, on the 30th day of December, 1874, and before its maturity, to the appellant.

The appellees jointly answered in three paragraphs, to the first of which the appellant replied by a general denial; and he demurred to each of the second and third paragraphs of said answer upon the ground that it did not state facts sufficient to constitute a defence to his action. This demurrer was overruled by the court, and to this ruling the appellant excepted, and then replied to said second and third paragraphs of answer by a general denial thereof.

The cause was tried by a jury, and a verdict was returned for the appellees; and the court rendered judgment accordingly.

The appellant's motion for a new trial was overruled by the court, and to this decision he excepted, and filed his bill of exceptions.

The appellant has here assigned, as errors, the following decisions of the court below.

1. In overruling his demurrer to the second and third paragraphs of the appellees' answer; and,

2. In overruling his motion for a new trial.

1. In the second paragraph of their joint answer, the appellees said, in substance, that the note in suit was given for an illegal consideration, in this, that, at the time of the execution of said note, William B. Walls was the prosecuting attorney for the Twentieth Judicial Circuit of this State; that, at that time, the appellee George H. Waugh was charged with an assault and battery, with intent to kill and murder one Elizabeth Waugh, at Boone county, Indiana; that thereupon the said Walls, so acting as prosecuting attorney for said circuit, did solicit and induce the appellees to execute a note to him, said Walls, for and in consideration that he, the said Walls, as such prosecuting attorney, would dismiss said cause, then pending against said George H. Waugh, wherein the State of Indiana was plaintiff, and said George H. Waugh was defendant; that the said Walls read the said note to be for twenty-five

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dollars and no more, and the appellees believed the said note to be for twenty-five dollars and no more, and, believing that the said Walls had correctly read the said note, they did not read the said note; that the said note was given for no other or different consideration than above named; that afterward the said note was assigned to the appellant in this cause, without any consideration whatever, and that the appellant, at the time of said assignment, well knew for what said note was given.

It can not be doubted, we think, that the facts stated in this paragraph of the appellees' answer were amply sufficient, if true, and the demurrer thereto concedes their truth, to constitute a complete defence to the appellant's action. These facts clearly show that the note in suit was executed upon a corrupt and illegal consideration, and upon no other consideration, and in consummation of a corrupt and illegal contract or agreement; and that the note was endorsed to the appellant, without any consideration whatever, and with full knowledge on his part of the consideration of such note. In the case of *The State v. Walls*, 54 Ind. 561, which was a prosecution against Walls for bribery in accepting a promissory note similar to the note now in suit, to influence his behavior in office, it was said by NIBLACK, J., in delivering the opinion of the court, "A note executed to a public officer, to improperly influence his official conduct, is not only without a valid consideration, but is against public policy, and hence utterly void." In the case of *The State v. Henning*, 33 Ind. 189, it was held by this court, that a prosecuting attorney is "an officer entrusted with the administration of justice," within the meaning of that expression as used in section 39 of the felony act, which section defines and prescribes the punishment for the offence of bribery. 2 R. S. 1876, p. 443. The only consideration for the note sued upon, under the allegations of his second paragraph of answer, was the promise of the

payee of the note, as a public officer, to do an illegal and corrupt act, in the pretended discharge of his official duty. It is very clear, that the appellant's demurrer to this paragraph of answer was correctly overruled.

In the third paragraph of their answer, the appellees alleged, in substance, that, at the time named in the complaint, they executed a note to said William B. Walls for the sum of twenty-five dollars, which said note, after its execution and delivery, was altered and changed so as to make it the note now in suit for one hundred and twenty-five dollars, instead of for twenty-five dollars, as it was when they executed and delivered it to said Walls; and that the appellant took an assignment of said note, and paid no consideration whatever for the same, then and there well knowing that said note had been so altered and changed as aforesaid, after the making and delivery thereof.

The appellant's counsel has wholly failed to discuss the sufficiency of this third paragraph of answer, or to point out any objections thereto, in his argument of this cause in this court. If, therefore, the court below erred in overruling his demurrer to this paragraph of answer, the error must be regarded as waived, under the settled practice of this court. The alteration of a note for twenty-five dollars to one for one hundred and twenty-five dollars, was certainly a material alteration, and if unauthorized by the makers of the note, and whether the fact of such alteration was known to the appellant at the time he took the assignment of the note, as alleged in the answer, or not, such alteration would avoid the note, and release the appellees from any liability thereon. *Holland v. Hatch*, 11 Ind. 497; and *Schnewind v. Hackett*, 54 Ind. 248.

2. The second error assigned by the appellant is the decision of the circuit court in overruling his motion for a new trial. The causes for such new trial, assigned by the appellant, were, that the verdict of the jury was not sus-



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Broyles v. The State, *ex rel.* Delong.

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tained by sufficient evidence, and that it was contrary to law. Under these causes for a new trial but one question is presented for decision, and that is, whether or not there was any legal evidence adduced upon the trial, tending to sustain the appellees' defences. The evidence is in the record, and it seems to us, from our examination of it, that there was legal evidence before the jury tending to sustain every material averment of each paragraph of the appellees' answer. In such a case, although the evidence is conflicting, we can not disturb the verdict of the jury, upon the weight of the evidence.

We find no available error in the record of this cause. The judgment is affirmed, at the appellant's costs.

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BROYLES v. THE STATE, EX REL. DELONG.

**BASTARDY.**—*Death of Relatrix.*—*Evidence.*—*Affidavit of Mother.*—The affidavit of the relatrix, instituting a prosecution for bastardy, is not competent evidence on behalf of the plaintiff on the trial of the cause in the circuit court, where, on the death of the mother, the child has been substituted as relator.

**SAME.**—*Recognizance.*—The recognizance executed by the defendant in such prosecution, on being bound over by the justice to appear in the circuit court, is not competent evidence against him.

From the Delaware Circuit Court.

*W. March* and *W. Brotherton*, for appellant.

*J. S. Buckles* and *J. W. Ryan*, for appellee.

**BIDDLE, J.**—This is a prosecution for bastardy, commenced by the State, on the relation of Isadora Delong, against the appellant, who was adjudged guilty by the justice of the peace, and recognized to answer the charge before the circuit court. In the course of the proceedings, Isadora, the relatrix, died, and the case was subsequently prosecuted by the child, as relator, in the place of the

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mother. On trial the appellant was found guilty. He moved for a new trial. His motion was overruled. Under the motion he reserved several questions for our consideration.

At the trial in the circuit court, the prosecution offered in evidence the original complaint in writing, under oath, made by Isadora DeLong, before the justice of the peace, which, over the objections and exceptions of the appellant, the court allowed to go to the jury as evidence. This ruling is erroneous. The original complaint was not any part of "the testimony of the mother" reduced to writing by the justice of the peace, under section 7, 2 R. S. 1876 p. 657, and was improperly admitted as evidence to the jury.

The prosecution also offered in evidence to the jury the recognizance taken before the justice of the peace, requiring the appellant to appear and answer the charge in the circuit court, which was also admitted over the objections and exceptions of the appellant. This was also error. The admission of the recognizance might have been harmless, and not sufficient ground to reverse the judgment, yet it was improperly admitted. A recognizance made "upon compulsion" can not be held to be a voluntary admission. *McKinsey v. Bowman*, 58 Ind. 88.

Judgment reversed, at the costs of the relator; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

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EX PARTE WALLS.

**ATTORNEY.**—*Proceeding to Disbar.*—*Criminal Prosecution.*—A proceeding to disbar an attorney for the commission of a crime may precede a criminal prosecution therefor.

**SAME.**—*Forgery of Affidavit.*—*Professional Misconduct.*—An attorney who forges and files in court an affidavit for, and thereby obtains, a change of

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the venue of a cause therein pending, thereby violates clause 4 of section 771, 2 R. S. 1876, p. 804, and may be disbarred therefor.

**SAME.—Surprise.—New Trial.**—Where, on the trial of a proceeding to disbar an attorney for such misconduct, the person whose name appears as the affiant testifies denying that he made or signed such affidavit, the defendant can not, on the ground that he was surprised at such testimony, obtain a new trial.

**SAME.—Burden of Proof.—Mistake.—Admissions.—Instructions to Jury.**—An admission by the defendant in such proceeding, in a statement of his defence, made by him to the jury, that he had prepared and filed the affidavit as charged, but that, by his mistake, the name signed to the affidavit, instead of the name of the real affiant, was attached thereto, makes out a *prima facie* case against him, and shifts the burden of proof, as to the mistake, to him, and it is proper to so instruct the jury.

**NEW TRIAL.—Newly-Discovered Evidence.—Surprise.—Diligence.**—A motion for a new trial on the ground of newly-discovered evidence or surprise should be denied, where, from the motion or the evidence, it appears that the applicant did not use due diligence to procure the evidence or to avoid the surprise.

From the Boone Circuit Court.

*C. S. Wesner, S. H. Buskirk and J. W. Nichol*, for appellant.

*T. J. Terhune*, for appellee.

**PERKINS, J.**—This was a proceeding against William B. Walls, an attorney at law, to disbar him from practising as such.

Thomas J. Terhune, Esq., was duly appointed by the judge of the Boone Circuit Court to file charges against Walls, said Terhune being a practising attorney in that court. The verified charge was, in substance, that Walls had forged, and used as genuine in the court, an affidavit for a change of venue in a cause pending in said court.

This cause was tried before Hon. Thomas B. Ward, as special judge. A demurrer to the charge was overruled, and exception entered.

Answer in general denial; trial by jury; verdict, as follows:

“We, the jury, find that the material allegations of the

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complaint are true, and that the defendant is guilty as charged in the complaint."

A motion for a new trial, by the defendant, based upon the following assigned causes, was overruled, and exception reserved :

"1. That he was surprised at the testimony of William I. Sutton, given upon the trial of this cause, in this; that he confidently believed, until within one hour before the trial commenced, that the said William I. Sutton would swear that he made the affidavit for the change of venue for and on behalf of the said Jacob L. Green, that said affidavit had been read over to him, that he had made his mark thereto. When he discovered that said Sutton would not so swear, he was then ignorant of any evidence by which he could prove the making of the affidavit by the said Sutton, and his admissions that he had so made said affidavit, and that, by reason of said ignorance, on his part, of the facts which he had since discovered, he did not apply for a continuance of the cause. And that defendant was further surprised at the evidence of the said William I. Sutton in this: that, immediately before the trial commenced, the said Sutton admitted that he paid this defendant three dollars at one time, when he testified upon the trial that he had, at no time, paid defendant three dollars, all of which facts fully appear in the affidavit of this defendant herewith filed.

"2d. That the court erred in instructing the jury that the burden rested on the defendant to prove, by a preponderance of the evidence, that the name of Jacob L. Green was signed to the affidavit for a change of venue, instead of the name of William I. Sutton, by a mistake, when the court should have charged the jury that the burden of the the proof rested on the plaintiff, and that plaintiff should have proved, by a preponderance of the evidence that the defendant knowingly, wilfully and corruptly signed the name of the said Jacob L. Green to the said affidavit.

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"3d. The court erred in charging the jury that, under the issues in this cause, the burden of proof shifted from the plaintiff to the defendant, upon the question as to whether the name of Jacob L. Green had been signed to the affidavit for a change of venue corruptly or by mistake.

"4th. That the defendant has, since the verdict was returned, discovered new, competent and material evidence for him, which he could not, with reasonable diligence, have discovered and produced at the trial, which will be made to appear by the affidavits of Nathaniel C. Titus, Ira Alexander, Richard M. Crouch and this defendant, herewith filed and made part hereof.

"5th. That the verdict of the jury is not sustained by sufficient evidence.

"6th. That the verdict of the jury is contrary to law."

The instructions to the jury were as follows:

"This is a proceeding instituted by direction of the judge of this court, against the defendant, for the purpose of suspending him, as an attorney, from the practice of the law. The complaint charges, in substance, that, at the September term, 1877, of this court, there was pending a certain cause wherein The Thorntown District Council of Patrons of Husbandry was plaintiff, and one Jacob L. Green was defendant; that the said defendant, Wm. B. Walls, was attorney for the said Jacob L. Green; that, for the purpose of misleading and deceiving the judge of this court, the said Walls, as such attorney, wilfully and corruptly prepared an affidavit for a change of the venue of said cause, and signed and forged the name of said Jacob L. Green to said affidavit, and attached his jurat, as notary public, to said affidavit, thereby certifying, under his official seal as notary public, that the said Green had signed and sworn to said affidavit, whereas, in truth and in fact, it is averred in the complaint, that the said Green never did sign said affidavit, and never was sworn to the same. It is fur-

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Ex Parte Walls.

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ther averred in the complaint, that the said defendant, Walls, filed said affidavit in this court, and thereby procured an order for a change of the venue of said cause from the county, and thereby deceived and misled the judge of this court.

“ The burden of the proof is on the prosecution, and it devolves upon the prosecution to prove every material allegation of the complaint, by a preponderance of the testimony, and unless this has been done to your satisfaction, you should find for the defendant ; but, if you believe from the evidence that the said defendant, Walls, did prepare said affidavit as charged, did sign and forge said Green’s name to it as charged, and did attach his jurat as notary public as charged, and did file said affidavit in this court, and thereby deceive and mislead the judge of this court, and procure an order for the change of the venue of said cause, then you should find the defendant guilty as charged in the complaint.

“ The defendant, for answer, has filed a general denial of all the allegations of the complaint. He has admitted before you, in his opening statement, that he wrote said affidavit, that he signed the name of said Jacob L. Green to it, and that he attached his jurat, as a notary public, to said affidavit, but he claims, by way of defence to this action, that the name of said Jacob L. Green was written in the body of said affidavit, and subscribed to said affidavit, by him, the defendant, through mistake, and that the jurat, certifying that Green swore to said affidavit before him as notary public, was made through mistake ; that, in truth and in fact, one William I. Sutton did sign said affidavit by his mark, and was sworn to said affidavit, before the defendant as a notary public. I have already instructed you that the burden of the proof, as to the material allegations of the complaint, is upon the prosecution. If you believe, from a fair weight of the evidence, or from the ad-

missions of the defendant, or from both together, that the defendant did prepare said affidavit as charged, did sign Green's name to it as charged, and attach his jurat thereto as a notary public as charged, then the defence set up by the defendant, that the affidavit was prepared by defendant, and Green's name signed to it through a mistake, whereas, in truth, the said Sutton signed the same by his mark, and was sworn to it before the said defendant as a notary public, is affirmative, and the burden of proof, as to this distinct matter of defence, shifts from the prosecution to the defendant; it devolves upon the defendant to maintain such affirmative defence by a preponderance of the testimony.

"I instruct you that this defence, if so made out to your satisfaction, is a good and perfect defence, and if you believe that said Sutton did sign said affidavit, by his mark, and was sworn to it by said Walls as a notary public, then you should find for the defendant."

The instructions were excepted to when given.

The errors assigned in this court are the following:

"1. The court erred in overruling the demurrer to the complaint;

"2. The court erred in overruling the motion for a new trial;

"3. The court erred in overruling the motion in arrest of judgment."

We proceed to consider the errors assigned

The court did not err in overruling the demurrer to the complaint, or charge, against the defendant. It is enacted by statute, 2 R. S. 1876, p. 307, that a court may suspend an attorney from practising therein, "For a wilful violation of any of the duties of an attorney, as hereinbefore prescribed."

One of the duties of an attorney, "hereinbefore described," is:

"To employ, for the purpose of maintaining the causes

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Ex Parte Walls.

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confided to him, such means, only, as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law." 2 R. S. 1876, p. 304.

The position is taken by the learned counsel for the appellant, as we understand them, that, where the means employed to mislead the court, etc., constitute a crime, the guilty party must be convicted of such crime, in a prosecution therefor, on the part of the State, in a criminal court, before he can be disbarred, citing section 777 of the code, 2 R. S. 1876, p. 306. The criminal, counsel insist, must be prosecuted by indictment or information.

This is doubtless true, when he is prosecuted for the purpose of inflicting the punishment affixed by law to the conviction of the crime in such prosecution; but the proceeding to disbar an attorney is not such a prosecution. *Mattler v. Schaffner*, 53 Ind. 245. If one be sued upon a forged note, he may prove the forgery, to defeat a recovery in the civil suit; and punishment will not be inflicted on proof of the forgery in such civil suit, nor will the proceeding in the civil bar a criminal prosecution for the same forgery.

While, in this case, a conviction in a criminal prosecution would have authorized a disbarment, in addition to the infliction of the statutory punishment, we think the proceeding to disbar may precede the criminal prosecution, and the proof of the crime may be made in such proceeding, simply as showing a cause for disbarment.

We pass to the second alleged error assigned, viz., overruling the motion for a new trial. The grounds set forth in the written motion therefor are copied in the forepart of this opinion.

The first was surprise at Sutton's testimony, given on the trial of the cause, that he did not make the affidavit, etc., and that he had not, at any time, paid defendant three



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dollars, etc. The fourth ground, which may properly be considered in connection with the first, was newly-discovered evidence.

The cause of his surprise at Sutton's testimony, the appellant states to have been, that Sutton did sign, and swear to, the affidavit for the change of venue, and supposed he would swear to the fact. But Sutton denies on oath, that he did sign, and swear to, that affidavit; and that, hence, he neither would, nor could have been expected to, testify that he did do so. And as to the newly-discovered evidence, supposing it shown that such has been discovered, no diligence is shown to have been used to discover it, in time for the trial; while it would seem from the facts disclosed, that the appellant must have had knowledge of it all the time, if it existed. At all events, it is clear, that a limited enquiry would have disclosed it to him.

On the trial of this cause the defendant, Walls, testified as a witness in his own behalf, touching the making of said affidavit, as follows:

"On the day the affidavit was made, Mr. Crouch and Mr. Sutton came to my office, in relation to the change of venue in said cause." (This was the 13th of September, 1877.) "\* \* \* I prepared the affidavit, and read it over to Sutton, and he told me to sign it; I signed it and he made his mark to it; I swore Sutton to it, and attached my seal to it; he then gave me three dollars to pay expenses of the change; \* \* \* I handed it to Lane, who placed the file mark on it; I handed Lane five dollars; he said he had no change, and handed it back; I thought no more about it till the ten days had expired; I then went to Mr. Cox or Lane, and spoke about perfecting the change, and it was found too late; the change had to be perfected in ten days. When I first heard that Green's name was to the affidavit, I denied it, for the reason that I intended to write Sutton's name to it; he told me to

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Ex Parte Walls.

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sign his name, after he made his mark ; I did not discover the mistake ; \* \* \* I did not prepare but one affidavit ; my recollection is, that, at the time said affidavit was made, Crouch and Sutton came to my office together ; my recollection is, that Crouch went out, and I prepared said affidavit, and read it over to Sutton ; Sutton told me that he could not write, and asked me to write his name to the affidavit ; my recollection is, that no one else was present when said affidavit was signed. I knew that Green could read and write ; he made his own bill of particulars in the case of the Patrons of Husbandry against himself."

Richard M. Crouch testified.

" Sutton and myself came to Lebanon together, and went away together ; he and I went to the law office of William B. Walls at the same time, and came away at the same time ; I was in Walls' office all the time that Sutton was there ; Walls and Sutton went in the back room of Walls' office a short time together ; Sutton was paying him some money ; they were not gone long enough to make an affidavit ; I did not see any affidavit ; I don't think Sutton, at that time, agreed to make the affidavit ; Sutton did not make any affidavit that night ; I don't recollect that any one else was present in Walls' office."

The above testimony was given on the trial of the cause.

In support of his motion for a new trial on account of newly-discovered evidence, he swore as follows, touching the time and manner of the making of said affidavit : "That the said William I. Sutton and one Richard M. Crouch came to the office of this defendant, in the city of Lebanon, Boone county, State of Indiana, in the early part of the month of September, 1877, when it was agreed that the said William I. Sutton should return and make an affidavit for and on behalf of Jacob L. Green, for a change of venue in a cause then pending in the Boone Circuit Court, wherein the Patrons of Husbandry were plaintiffs, and Jacob L. Green

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Ex Parte Walls.

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was defendant; that the said William I. Sutton did return to the office of this affiant a few days thereafter, when this affiant wrote the affidavit," etc.

He also produced the affidavits of others.

1. That of Nathaniel C. Titus, in which he swore that he was in said Walls' office, in the forepart of September, 1877, when said Crouch and Sutton were there, and talking about a change of venue in the case of said Green, at the suit of the Patrons of Husbandry, and that it was then and there "agreed by Walls and Sutton, that Sutton was to come back in time and make the affidavit. Crouch and Sutton then left the room together. \* That, in two or three days afterward, he was present again in the office of Mr. Walls, when Mr. Sutton came again into the office and asked Walls if he had that affidavit ready. Walls said no, but he could soon write it." He then wrote it, read it to Sutton, who said it was right, and told Walls to sign it, Sutton touching the pen while he did so; and then Walls swore Sutton to it, and affixed his certificate. Walls then asked Sutton for money to pay the costs; Sutton gave it to him; don't know how much; and Walls then picked up the papers and started for the court-house.

The above affidavit is not in harmony with the testimony of Walls.

2. That of Ira Alexander, in which he swore that, in the latter part of November, or forepart of December, 1877, he was present in Walls' office, when Sutton admitted that he made the affidavit in question.

The present case was tried March 8th and 9th, 1878.

Counter affidavits on the motion for a new trial were filed:

1. That of Sutton, denying that he made the affidavit for a change of venue.

2. Denying that he made the statements sworn to by Alexander.

3. That of Richard M. Crouch, in denial of the threats

sworn to by Walls, in his affidavit for the new trial, and other charges sworn to by said Walls.

4. That of Joseph Flannigan to the same effect.

These counter affidavits were admitted and used without objection. We think no case for a new trial is made on the grounds of surprise and newly-discovered evidence. This proceeding was commenced on the 4th of February, 1878, and was not tried till the 8th of March following, thus giving the appellant over a month to look after testimony.

Surprise, as a ground for a new trial, must be such as ordinary prudence could not have guarded against. 2 R. S. 1876, p. 180. It requires no argument to show that the appellant could have guarded against being surprised by the testimony of Sutton, by calling on him during the month before the trial, and learning what his testimony would be touching the fact of the making of the affidavit.

Newly-discovered evidence, after the trial, is not a ground for a new trial, unless due diligence failed to discover it before the trial. 2 R. S. 1876, p. 181. Here, no diligence was used; while the witnesses, expected to give the newly-discovered evidence, were the neighbors of the appellant; Mr. Titus, the principal one, being, it would seem, in the habit of visiting at the appellant's office, was in it at both the times it is claimed that Sutton was there about the change of venue, and when he says Sutton made the affidavit, which had occurred, according to appellant's statement, only about four months previous to the commencement of this prosecution, while the subject had been matter of general comment in the mean time. See, as to the character of newly-discovered evidence, 2 R. S. 1876, p. 181. As we have said, no diligence was shown.

The second and third grounds of the motion for a new trial were, that the court erred in its instructions as to the burden of proof.

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Ex Parte Walls.

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We may here remark, that the statute requires the wrongful act of the attorney, for which he may be disbarred, to be wilfully (intentionally) done, but not corruptly; and a charge, made and proved, that is within the statute, is sufficient. 2 R. S. 1876, p. 307.

The court did not err in its instructions to the jury. If the evidence and admissions made a *prima facie* case against the appellant, the burden of overthrowing such *prima facie* case was upon said appellant. We think such *prima facie* case was presented, hypothetically, to the jury, in the instructions of the court. If the party committed the wrongful acts, the presumption would be, nothing showing the contrary, that he did so wilfully, intentionally and purposely. A person generally acts in obedience to his will. In 1 Greenleaf Evidence, p. 93, note 2, in the chapter "Of the Burden of Proof," we find the following:

"In general, where the plaintiff makes out a *prima facie* case, although the burden always remains on him to support his case, yet this *prima facie* case supports it, and becomes conclusive unless met and controlled by the defendant; and, while the burden of proof does not strictly shift, but still remains with the plaintiff upon the facts he alleges, yet he may stand upon his *prima facie* case, and the defendant must take up the *onus* of controlling it, and this burden is upon him. *Burnham v. Allen*, 1 Gray (Mass.), 500; *Caldwell v. N. J. St. Nav. Co.*, 47 N. Y. 290; *Eaton v. Alger*, *Id.* 51 [351?]." *Wilder v. Cowles*, 100 Mass. 487.

The remaining ground for a new trial was, that the verdict was contrary to law and the evidence.

We think the verdict was sustained by the evidence, and was not contrary to law.

There was no error in overruling the motion in arrest.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

JONES v. THE STATE.

**CRIMINAL LAW.—Murder.—Evidence.—Previous Assault.—Cautiousness of Deceased. Motive.—Opportunity.**—On the separate trial of a defendant, who was indicted jointly with A., B., C. and D., for the murder of one toward whom all but D. harbored ill-will engendered by adverse interests in a certain estate, wherein it appeared by the evidence that the deceased was murdered, of an evening, while entering his residence, which was in town, and that, long previous thereto, but after such ill-will had arisen and while the deceased was living elsewhere, he had been seriously injured by missiles exploded in his house by the defendant, it was competent to prove, that, during all of the time elapsing between such explosion and the murder, except on the evening of the murder, the deceased had always entered his residence before dark, and that he and his family never ventured out of the house after dark, but fastened the doors, and slept up stairs.

**SAME.—Threats Toward Deceased's Family, and Proposition of Compromise, after Murder.—Malice.**—It was competent, on such trial, as tending to show malice, to prove, that, after the murder, the defendant proposed that the family of the deceased, if they would make a certain compromise in relation to such estate, might return to their former home unmolested, and vaguely threatening them if they did not comply.

**SAME.—Declarations of Accomplice.—Conspiracy.**—D. having pleaded guilty as charged in the indictment, and having testified, that, pursuant to a common purpose to commit the murder, means similar to those used in committing the murder were prepared by the others, in the absence of C., on the day it was committed, that the defendant had threatened to kill the deceased, and had tried to induce the witness to do the killing, and that A. and B., having left C., D. and the defendant, with the understanding that they two were to kill the deceased, had returned declaring that they had done so, it was competent to give in evidence a conversation had between the witness and C., after such preparations and before the murder, and in the absence of the defendant, relative to the proposed murder.

**SAME.—Conduct of Defendant Toward Witness, after Murder.—Impeachment of Witness.—Evidence.**—The conduct of the defendant, after the murder, in causing the arrest of the witness, D., for another crime, his explanation thereof to D., and his furnishing the latter with money to leave the State, was competent, on his re-examination, as explaining his relations with the defendant.

arrest, which was developed by the cross-examination.

**SAME.—Intimidation of Witness.**—It having been developed on the examination of a witness for the State, that her testimony on the preliminary ex-

64	473
135	258
64	473
148	263
64	473
154	248
154	650
154	661
64	473
157	396

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amination contradicted her present testimony, it was competent to prove, by her, threats made by the defendant to be, and which were, communicated to her by D., prior to her former testimony.

**SAME.—*Weapon Carried by Defendant to Intimidate.***—Such witness having testified that the defendant, on informing her that she was to be indicted for perjury, had declared to her, on her proposing to him to confess the perjury, that "he had a revolver in his boot for all who went back on him," it was competent to prove, that, on the day of his arrest, he was armed as he had so declared.

**SAME.—*Declarations of Accomplice.—Conspiracy.***—Declarations by B, made while armed and in company with the defendant, and during the pendency of a lawsuit in regard to such estate, which indicated a lying in wait for the deceased, were competent evidence, as tending to establish the conspiracy testified to by D.

**SAME.—*Transcript of Record.—Harmless Evidence.***—The transcript of the record of such cause, made on a change of the venue thereof, though incompetent, was harmless evidence.

**SAME.—*Threats and Admissions of Third Person.***—Threats made by a third person to kill the deceased, and admissions by him that he had procured D. to commit the murder, were not competent evidence for the defence.

**SAME.—*Res Gestæ***—Declarations by a third person, accompanying acts tending to show that he, and not the defendant, had committed the murder, would be competent evidence for the latter.

**SAME.—*Intimidation of Witness by Other Witnesses.—Impeachment of Witness.***—It is incompetent for a witness for the defendant to state what means, if any, had been used by witnesses for the State to prevent him from testifying, where no ground for their impeachment has been laid.

**SAME.—*Instruction to Jury.—Matters of Fact.***—It is proper to refuse to give an instruction which embraces a theory of defence founded on matter of fact solely, without any statement of the rules of law applicable thereto.

**SAME.—*Failure of the Theory of the State.***—Where the evidence of the crime is largely circumstantial, as against the defendant, some of it tending to sustain the theory advocated by the State, and some a different theory, but each theory tending to implicate the defendant, it is proper to refuse to instruct the jury, that, if they have a reasonable doubt of the truth of the State's theory, the defendant should be acquitted.

**SAME.—*Crime Procured by Conspirators.—Alibi***—It appearing from the evidence in such case that the murder had been committed pursuant to a conspiracy so to do by the parties indicted, though possibly by the hand of some one not a party to the conspiracy, it was proper to instruct the jury that the defendant and his "confederates" (those indicted with him), though not present at the murder, might yet be guilty as conspirators.

**SAME.—*Credibility of Accomplice as a Witness.***—It was proper to refuse to

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instruct the jury, in relation to the credibility of a confessed accomplice who had testified, that formerly, under the law as it then was, he would not have been allowed to testify.

**SAME**—*Credibility of Witness Admitting Former Perjury*.—It is proper to refuse to instruct the jury, in relation to the testimony of a witness who has confessed to having testified falsely on a former trial; because of fear of some person, that the jury should reject such testimony if, in their opinion, there were no facts existing sufficient to inspire such fear.

**SAME**.—*Opinion of Judge.—Capital Punishment*.—A defendant, on trial for murder, can not complain of an instruction which indicates that the court is opposed to capital punishment.

**SAME**.—*Harmless Refusal*.—Where the substance of an instruction asked is embraced in one given, the refusal is harmless.

From the Monroe Circuit Court.

C. F. McNutt, for appellant.

T. W. Woollen, Attorney General, R. W. Miers, G. W. Friedley, G. Putnam, F. Wilson, M. F. Dunn, J. W. Buskirk, H. C. Duncan, J. L. Meginity and T. B. Buskirk, for the State.

**WORDEN, J.**—The appellant, Alonzo B. Jones, and Lee Jones, Milton P. Toliver, Thomas Toliver and Eli Lowry, were jointly indicted in the Orange Circuit Court, for the murder, in the first degree, of Thomas Moody, by shooting him with a gun.

Eli Lowry pleaded guilty to the indictment, and was sentenced to imprisonment in the state-prison for life. The other defendants pleaded not guilty, and, on their motion, a change of venue was granted, to the county of Monroe.

In the Monroe Circuit Court the defendants elected to be tried separately, and the appellant was put upon his trial separately, before a jury, which resulted in his conviction and sentence to imprisonment for life in the state-prison.

Three errors are assigned, as follows:

1. The court erred in overruling the motion to quash the indictment.



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2. The court erred in overruling the defendant's motion for a new trial; and,

3. The court erred in overruling the defendant's motion in arrest of judgment.

In the brief of counsel for the appellant no reason is pointed out for the quashing of the indictment, or for the arrest of judgment, and we see none. We therefore proceed to the consideration of the motion for a new trial.

It may be gathered from the evidence, that Alonzo B. Jones and Lee Jones were brothers, and sons-in-law of William Toliver, and that Milton P. Toliver and Thomas Toliver were brothers to each other, and sons of William Toliver. It does not appear that Eli Lowry was related to either of the parties. William Toliver, having become a widower, married Polly Moody, a sister of Thomas Moody, the deceased. William Toliver having died after his marriage with Polly Moody, much ill feeling seems to have arisen, on the part of his sons and sons-in-law, against the Moody family, and especially against Thomas Moody, apparently growing out of the settlement of his estate. At the time of the homicide Thomas Moody was living at the town of Orleans, and the Joneses and Tolivers were living at or near Mitchell, some five miles distant from Orleans. On the evening of March 2d, 1875, Thomas Moody, as he was about entering his gate at his residence in Orleans, was shot with a gun and wounded by some one from the outside, from which wounds he died the next day.

The evidence in the cause is set out in a voluminous record, containing over fifteen hundred pages of manuscript, from which it appears, beyond a reasonable doubt, as we think, that the appellant, if he did not perpetrate the homicide with his own hand, counselled, aided and abetted in the perpetration thereof.

With this brief statement of the general features of the

case, we proceed to consider the grounds urged in the brief of counsel for the appellant for a reversal of the judgment. We may remark, however, before proceeding to consider these several grounds, that we can not reverse the judgment upon the evidence, which, as before intimated, makes out the case quite satisfactorily.

The other grounds may be conveniently divided into classes, as follows :

1. Such as relate to the admission of evidence objected to by the defendant ;
2. Such as relate to the exclusion of evidence offered by the defendant ; and,
3. Such as relate to the charges given and those refused.

It was proved by William Moody, a brother of the deceased, that, on the night of the 24th of June, 1871, when the Moody family, consisting of the witness, Thomas Moody, now deceased, Polly Toliver, and one or two other members of the family, lived elsewhere than at Orleans, the house was broken into by persons from the outside, and sundry explosive and inflammable missiles were thrown into the house, which exploded therein, scattering their destructive contents, such as buckshot, nails and pieces of iron, about the house, injuring the inmates and doing much damage by burning and otherwise. In this raid Thomas Moody, now deceased, was severely injured by some of the missiles, or by a gun or pistol shot. The evidence was received on the statement of the prosecutor, that he would afterward give evidence connecting the defendant with the transaction, which was done. The family afterward moved to Orleans.

The witness was then asked by the counsel for the State the following questions :

“I will ask you, when you lived at Orleans, what condition you lived in, as to going out, or keeping your house barred up?”

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Objection by the defendant overruled, and exception.

The witness answered: "When we first went there we lived at McDonald's; we rented a portion of that house, slept up stairs and fastened the doors up, and when we moved down where we live now we fastened all the doors, and generally stayed in after dark. The deceased generally "came in about dark, and" the witness did "not remember of any occasion when" the deceased "was out after dark, excepting the night he was shot, and on occasions when he was away on business, and was gone from home all night."

We can by no means say that the evidence thus objected to was inadmissible. Motive is generally an important element to be considered in cases of alleged murder, especially where the identity of the supposed murderer is controverted and required to be established.

The supposed motive of the appellant in making the raid upon the house of the Moodys in 1871, and in afterward taking the life of Thomas Moody, was his malice and ill-will engendered by the settlement of the affairs of the estate of William Toliver; and it might be supposed that if such was the motive that prompted the murder, it would have been much sooner accomplished. But the careful and guarded manner in which Thomas Moody lived at Orleans may serve to explain why no safe opportunity was sooner presented for taking his life, and, therefore, why the murder, prompted by such motive, was not sooner perpetrated. In this aspect of the case, we think the evidence was competent, and we need not consider whether there was any other ground on which it was admissible.

The State proved by Zachariah Burton, that, after the death of Thomas Moody, the appellant spoke to the witness about a compromise with the Moodys. He wanted the witness to tell the Moody family, in substance, that he wanted them to pay him \$5,000, and the widow Toliver to deed back the land she had got from the estate, and pay rent

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from the time she had it; and if they did not do so he would make it cost them \$10,000. If they did, they might move back uninterrupted by any one. The appellant asked the witness if he did not wish to live in a civil community, and the witness replying in the affirmative, the appellant said it would not be, and that the poisoning of Bob Hall's horses was nothing to what it would be. A similar statement was made by the appellant to Isam Hall, and proved by him. This evidence was objected to by the appellant, but we think it was properly admitted, as tending to show such malice and ill-will on the part of the appellant toward the Moodys, growing out of the affairs of the estate of William Toliver, as might have prompted the commission of the murder.

The State introduced Eli Lowry as a witness, who had pleaded guilty to the indictment and had been sent to the state-prison, and proved by him, among other things, that, before the day on which the deceased was killed, the appellant had threatened to kill him, and had tried to induce the witness to do so; that, on the morning of that day, the appellant told the witness he was going to kill Moody that night, and wanted the witness to go along. During the day Parks Toliver gave the witness some shot, and told him to take them to the appellant's mill, for Lee Jones. This the witness did, and found Lee Jones there. Lee Jones loaded some guns, and fired them at a target, to try them. During this time the appellant came there; and it was arranged that the witness and Lee Jones should go by themselves from Mitchell, and that the appellant and Parks Toliver and Thomas Toliver should go by themselves, and that the parties should all meet at a designated place a little less than a mile from Orleans, to go and kill Moody. Accordingly the parties all met at the designated place. It was then arranged that Lee Jones and Parks Toliver should go forward to Orleans and commit the deed, while

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the appellant, Thomas Toliver and the witness remained behind. Accordingly Lee Jones and Parks Toliver went forward. When they had been gone some time, those who remained behind heard two shots fired, in the direction of Orleans, and soon thereafter Lee Jones and Parks Toliver returned, reporting that they had accomplished the purpose, Lee Jones having done the shooting. The parties then hurried back to Mitchell.

The witness, in the course of his examination, spoke of his having been down town after the arrangement above mentioned had been made, and was asked by the State who of the parties he saw down town, to which he replied that he thought he saw Tom Toliver. The State then proved by the witness, that, at the time, Thomas Toliver asked the witness whether he was going to go with them to do the work, that the witness replied that he did not know whether he was or not, and that Toliver told him to "get ready."

This conversation between the witness and Thomas Toliver is objected to by counsel for the appellant, because the appellant was not present. We think, however, that the evidence of it was properly admitted. The conversation evidently had reference to the common design and purpose. The statements of Thomas Toliver were, according to the evidence, the statements of a co-conspirator in reference to the subject of the conspiracy, and in furtherance of its objects.

Though he does not appear to have been present when the arrangement was made, testified to by Lowry, to go to Orleans that night and kill Moody, yet the fact that he did go on that occasion, if such be the fact, as testified to by Lowry, shows sufficiently that he was one of the conspirators, and this made his statements in furtherance of the common purpose competent evidence against his co-conspirators. 1 Greenleaf Ev., sec. 111; *Williams v. The State*, 47 Ind. 563.

On the examination of Lowry, something was said about his having been brought back to Mitchell, after having gone away, on a charge of the larceny of some money from Jefferson Jones. This seems to have occurred after the death of Moody, but before any one was arrested on the charge of his murder. The State proved, in answer to questions put to the witness, that, after he was brought back, the appellant told him that he, the appellant, had had him brought back as a friend, and that, if the party losing the money intended to prosecute him, he would do so by the Saturday following, and that the witness should stay there during that time; that he did stay there until Saturday night, when he left for Illinois, the appellant letting him have money for that purpose.

The appellant objects that this evidence was totally irrelevant. We do not think it was so clearly so as to justify a reversal for its admission.

It might serve to illustrate the feelings and relations between the appellant and the witness. The appellant might have desired to befriend the witness, as an act of kindness and generosity, or he might, for other reasons, having relation to the murder of Moody, have desired to keep on good terms and not break with the witness. We think the evidence was competent to go for what the jury might regard it to be worth.

Mrs. Alice Patterson testified as a witness in the cause, on behalf of the State. It appeared in the evidence, that she and her husband lived at Mitchell, at the time of the murder, and that Eli Lowry boarded with them at that time. On the preliminary examination of the cause before a justice of the peace she had testified, that Eli Lowry was at their house, on the evening of the murder, took supper there, and stayed all night. This was contrary to her evidence delivered on the trial below. It also appeared by

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the evidence of Lowry, that the appellant directed him to go to the Pattersons and get them to swear that he, Lowry, ate supper there that night, and was there during the evening. Mrs. Patterson, in answer to questions put by the State, testified, that Eli Lowry told her the next morning after the murder, that may be they would indict the appellant or arrest him right away, and he was a good friend of the appellant's, and if we (the Pattersons) were asked if he, Lowry, was there at our house for supper, to say he was there, to testify to that. Patterson asked how that was if he was innocent, and he said they would get him into trouble. He said he came in that night. He said, if we would not testify to this, the consequence would be that we would not be safe to step out in the yard after dark; the house would be blown up and all of us in it; he said that time and again. He said he himself was afraid of Jones.

The last statement, as to Lowry himself being afraid of Jones, we understand the court to have ruled out as incompetent.

It is insisted that the statements thus made by Lowry to the Pattersons were not competent.

But we are of opinion that they were clearly competent, as tending to explain the discrepancy between her present evidence and that delivered by her on the examination before the justice.

The statements of Lowry, if made, were in the nature of facts tending to show that Mrs. Patterson's evidence before the justice was given under the influence of fear and intimidation; and, if the jury believed such to have been the case, they probably would not think the discrepancy should detract, so much as would otherwise have been the case, from the credit that should attach to her evidence.

Columbus Moore was examined as a witness by the State, and he testified, that, after the death of William Toliver,

and after some lawsuits had arisen in reference to his estate, on the occasion of a lawsuit at Bedford, Thomas Moody was up stairs, at the Hughes Hotel, at Bedford. The appellant and Parks Toliver were at the house, down stairs in the bar-room. The bar-room opened into a hall which contained a stairway leading up stairs. Parks Toliver opened the door leading into the hall, having a pistol in his right hand, and, looking up the stairs, asked the witness if Thomas Moody was up stairs, and being told that he was, asked what he was doing, and was told that he was playing cards. He said he was d—d tired of waiting. Some one then came down the stairs and went out. No further particulars are stated as to what was said or done by the appellant or Toliver. The bar-room was a small room, and Toliver appeared to be slightly intoxicated.

It is objected that this evidence was incompetent, but we are of a different opinion. The facts detailed might be regarded as having a tendency to show a purpose on the part of Parks Toliver to shoot Moody. If what was said and done by him was said and done in the presence and hearing of the appellant, it was competent to go in evidence, and it was for the jury to judge, from all the circumstances, how far the appellant concurred in, or dissented from, the supposed purpose. The bar-room was small, and it was for the jury to judge whether the appellant heard and saw what was said and done. But, aside from this view, there was evidence tending to show a conspiracy, as we have already seen, between the appellant, Parks Toliver and others, to kill Moody; and Greenleaf says: "It makes no difference at what time any one entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by the others and a party to every act which may afterwards be done by any of the others in furtherance of such common design." 1 Greenl. Ev., sec. 111.



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Alice Patterson, it seems, was indicted for perjury. She testified, that, in a conversation between herself and the appellant, he told her she was going to be indicted. She told him she had a great mind to go up and plead guilty, and tell the truth about it. He said it would do her no good if she did. He said he had a revolver in his boot for all those who went back on him.

William F. Clark was afterward called by the State, and the State proved by him that when the appellant was arrested he had two revolvers in his boot leg. The evidence of Clark is objected to, but we think it was competent.

Though the time of the arrest and that of the conversation are not precisely shown, the evidence tended, as we think, to corroborate and sustain the evidence of Mrs. Patterson.

The State was allowed to give in evidence the transcript of the record in the cause sent from Orange county. This is complained of as erroneous. We see no good purpose that was subserved by giving this transcript in evidence. It was an unnecessary but harmless piece of evidence.

This disposes of the points made on the evidence given.

We come now to that offered by the defendant and rejected.

The defendant, at the proper time, offered to prove by other witnesses, that one Jefferson Huffstetter had, at various times prior to the death of the deceased, threatened to kill him; and, after his decease, admitted that he did kill him; that he had hired Eli Lowry to kill him; that he did not himself kill him, but that his money did, and that, on the night of his death, he had slept with his boots on.

These threats and admissions of Huffstetter were rejected, and we think correctly. If Huffstetter had been on trial for the murder, his threats and admissions would

have been competent evidence against him; but we do not see how they could be competent in favor of any other party. They were statements not made under oath. Doubtless, any act of Huffstetter might have been proved that would have had a tendency to show that he, and not the appellant, was guilty of the murder, and any thing he said, while doing the act, illustrating its purpose and character, being a part of the *res gestæ*, might have been proved. But such was not the case here. See, as to the inadmissibility of the evidence, the case of *The State v. Duncan*, 6 Ired. 236, and case there cited.

The defendant offered to prove, that, upon the trial of a cause in the Masonic Lodge, before the Masonic body, at Mitchell, in which Huffstetter had preferred charges against the appellant of striking and kicking him, the appellant, making his defence, said, in the presence of Huffstetter, amongst other things, that Huffstetter had accused him of the killing of Thomas Moody, when he, Huffstetter, knew that he himself was the murderer of Thomas Moody; when he knew that the appellant knew, and others knew, that he, Huffstetter, was the murderer of Thomas Moody; that Huffstetter hung his head, and, after the appellant finished his speech, made no denial, in any way, of the charge thus made against him.

This evidence was rightly rejected. We see nothing in it that could legitimately have tended to prove either that Huffstetter was, or that the appellant was not, guilty of the murder.

The defendant introduced as a witness one Thomas D. Lindsey, and, having examined him generally in the case, put to him the following question:

“Has there been any effort made by Robert Teagarden, Charles Keith and Ed. Millis and Ward, to prevent you from testifying in this case?”

On objection being made by the State, the counsel for the

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defendant stated "that he desired to show the means and appliances used by those managing the prosecution, to show the influences brought to bear on witnesses."

The objection was sustained, and, as we think, properly. It will be observed, that the question was not asked with a view to the impeachment of any of the persons named; no foundation had been laid for that. It will also be observed, that there was no offer to prove any thing definite. What the "means and appliances" and "influences" were, was not stated. But, assuming that the persons named in the question had been actively instrumental in aiding the prosecution, and that they had made efforts to prevent the witness from testifying, we do not see how that fact could have had the slightest influence in determining the guilt or innocence of the appellant. The persons named might, doubtless, when examined by the State, have been asked, on cross-examination by the defendant, with a view to test their credibility, whether they had made such effort, and, if they had denied it, they might have been contradicted by proof of the fact.

This disposes of all the questions arising upon the admission or rejection of evidence.

We pass to the instructions.

The appellant's counsel prepared twenty-six charges, and asked that they be given to the jury, but the court refused them all, and gave thirty-eight of its own motion. We may remark, that the charges given were more than usually full and explicit, and placed the law of the case fully and fairly before the jury. Some objections to portions of them will be hereinafter more fully considered. The chief question arising on the charges is, whether those given by the court embraced the substance of all those asked by the appellant, which should have been given in the absence of those given by the court. The charges asked and refused,

and those given, are too long to be here set out in full, and we shall refer to such portions of them only as may be necessary to an understanding of the questions involved.

The first and second charges asked contained a general outline of the case as shown by some of the evidence, and stated a theory of the case, but did not contain any statement of law whatever. There was no error in refusing these charges, because they had reference to matters of fact and not of law.

The third charge asked was as follows:

“There is no other theory of the killing having been done by the defendant, or participated in by him, upon which any evidence has been offered, or as tending to establish which any evidence has been offered by the State, than the above mentioned. The court therefore instructs the jury, that if, upon all the evidence in the case, the jury entertain a reasonable doubt of the truth of this theory, that is, entertain a reasonable doubt that the defendant, in the manner set forth in Lowry’s evidence, killed, or participated in the killing of, the deceased, Thomas Moody, then they should acquit the defendant; for the State can not assume a theory as to the manner and circumstances of the killing, and, upon finding that that manner and method of killing has not been established to the satisfaction of the jury, ask the jury to supply the defect in such proof by surmise or mere conjecture.”

We think there was no error committed in refusing this charge, because we can not say that there was no evidence tending to show that the appellant participated in the murder of Moody, though it may not have been committed “in the manner set forth in Lowry’s evidence.” There was, on the contrary, some evidence tending to show that he participated in that murder, or counselled, aided and abetted therein, though it may not have been done as stated by Lowry.

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The counsel for the appellant claims, as we understand his brief, that the State, having tried the case on the theory that the murder was perpetrated in the manner stated by Lowry, could not claim a conviction on any other theory. We see no reason for this proposition. The State might go through the trial on a particular theory, and, if the evidence developed facts tending to show the defendant's guilt on any other theory, the question of the defendant's guilt on the other theory would be a matter proper for the consideration of the jury.

We here copy the following charge given by the court, because it states the views of the court below upon the point we have been considering, and also because it is claimed to have been erroneous in another respect:

"And so, also, I have indicated, and now charge you, that if this evidence, or any evidence in the case, causes you to entertain a reasonable doubt of defendant's guilt, you should acquit. But, in considering the question of *alibi*, it is important that you look into all the testimony in the case, and determine whether it is necessary, in order to establish the guilt of defendant, that the State should convince you beyond a reasonable doubt, that the defendant and those indicted with him, should have left Mitchell in the evening of said 2d day of March, 1875, or at all that day, and should have participated in said homicide, by the performance of the several and identical parts assigned them by the testimony of the witness Eli Lowry, and that Lowry himself should have participated in said homicide in the manner and form he himself asserts, or should have been at the several places on that day and at the several times he asserts; and in this connection I instruct you, that, if you are convinced beyond a reasonable doubt, from the whole testimony in the case, that, at the time and place mentioned in the indictment, the said Thomas Moody was unlawfully slain by the hand of some

one, and that the defendant was a guilty participant in said homicide, by having feloniously counselled, encouraged, hired, or otherwise procured such person to so unlawfully kill Moody, you should find him guilty of said homicide, although you may also find that the *alibi* asserted by him, both as it regards himself and his confederates, and also the witness Lowry, may be true. For you should bear in mind, that the principal and real issue you are to determine is the question of defendant's guilt or innocence of the alleged murder of Thomas Moody and although you should find, that the State has failed to prove against him particular acts of participation charged against him by said Lowry, but find that she has, nevertheless, proved, beyond a reasonable doubt, his guilt of said murder, you should so find him guilty."

It is objected that the part of the charge which informed the jury that they might find the defendant guilty, in case they were satisfied by the evidence, beyond a reasonable doubt, of his guilt, though they might find that the *alibi* asserted by him, both as regards himself and his confederates, and also the witness Lowry, may be true, is erroneous.

We think the word "confederates," as used in the charge, was used in the sense of "those indicted with him," words used in the former part of the charge, and that it must have been so understood by the jury. With this meaning attached to the word, the charge, in our opinion, was correct. The appellant may have been guilty of counselling, aiding or abetting in the commission of the murder, and yet neither he nor those indicted with him may have been at the place of the murder at the time thereof, but elsewhere.

Again, the appellant and his confederates may have been elsewhere when the murder was committed, and yet the appellant may have been guilty of having procured its

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commission by the hand of some one not having joined the confederacy, and who could not properly be called a confederate, but a mere instrument. Either view will uphold the charge; for we have a statute which provides, that "Any person who counsels, aids, or abets in the commission of any offence, may be charged, tried and convicted in the same manner as if he were a principal." 2 R. S. 1876, p. 388, sec. 66.

The 4th, 5th and 6th charges asked related to the credibility which should attach to the testimony of the witness Lowry, he being a convict under life sentence for murder. We think the law on that subject was correctly and sufficiently stated in the charges given by the court. The court did not, it is true, state to the jury, as was asked, that in times past such convict was incompetent to testify at all; but this was unnecessary. It was sufficient that the jury were given to understand that his infamy as such convict went to his credibility, without stating what the law had been in former times. The then present, and not the past, state of the law was what governed.

The 7th, 8th and 9th related to the testimony of Lowry as an accomplice, and we think their substance was embraced in the charges given.

The 13th related to the credibility of witnesses who have committed perjury on a former occasion, and was substantially embraced in the charges given.

The 14th was as follows, and was correctly refused:

"When a witness pretends that he or she has sworn to a different state of facts from that to which he or she now swears, because of fear of some person, the jury are not bound to, or justified in accepting the statement that such witness was operated upon by such pretended fear. But the jury should look behind that statement at all the facts, and if they find that there were no facts existing sufficient to inspire such fear, they may, and if they can find

no other reason for such conduct, they ought to, reject the evidence of such witness entirely."

The charge was an invasion of the province of the jury, who had the exclusive right to determine what credit should be attached to the testimony of the witnesses. The idea is embodied in the charge, that, if there were no facts sufficient, in the opinion of the jury, to inspire the fear, and if they could find no other reason for the conduct of the witness, his evidence ought to be rejected entirely.

This cannot be laid down as a rule of law. What might seem to the jury as not sufficient to inspire fear might, in point of fact, have inspired fear on the part of the witness. Indeed, fear is inspired on many occasions and in various situations in life when there does not appear to be any sufficient cause for it. Much must depend upon the temperament and mental constitution of the person whose fears are supposed to be wrought upon. What might inspire terror in one might excite no apprehension in another. Such questions should be left to the untrammelled determination of the jury, who seldom fail to pass upon them intelligently.

In the brief of counsel for the appellant, it is said of instructions 15 to 19 inclusive, that "these instructions, in substance, ask the court to charge the jury, in view of the theory of the prosecution, that the presence of the defendant in Mitchell, on the night of the alleged murder, or the presence of the witness Lowry at Orleans, on the afternoon of the 2d of March, 1875, would, both or either, be fatal to the cause of the State," etc.

What has been already said shows that these instructions were properly refused.

Instructions asked, numbered 20, 21 and 22, relate to the subject of threats and admissions, upon which, it seems to us, the court fully charged.



No point is made upon the refusal of the court to give any of the other instructions asked; nor is any further objection made to those given, except the following:

“As to murder in the first degree, the statute submits to your discretion a choice between two modes of punishment. The Legislature has made it a part of the law of the State that you shall have the right to prescribe the penalty of death for such offence. Just how far such legislation has changed or modified, or to what extent it is in accordance with, the eternal laws of the Author of Life, you must determine on your own responsibilities to Him. I do not attempt to determine this for you, and, on the other hand, would not be understood by this charge as giving any personal sanction to this feature which our law-makers have borrowed from the barbarisms of the past. The other form of punishment prescribed by the statute is that of imprisonment for life in the state-prison. The punishment for murder in the second degree is imprisonment in the state-prison for life. The punishment for manslaughter is imprisonment in the state-prison for not more than twenty-one, nor less than two, years.”

It is urged by counsel for the appellant, that this charge was wrong, as being calculated to impress on the minds of the jury a conviction that the judge thought him guilty. We do not think the charge open to the objection. The jury might well have concluded from the charge, that the judge was opposed to capital punishment; and it is by no means certain that the charge did not have some influence on the minds of the jury in fixing the lighter punishment; but of this the appellant can not complain.

We have thus considered the questions involved, and find no error in the record.

The judgment below is affirmed, with costs.

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## WALLS v. PALMER.

**ATTORNEY.—Judgment Disbarring—Appeal to Supreme Court.**—An appeal lies to the Supreme Court, from the judgment of a circuit court suspending an attorney thereof from practice therein.

**SAME.—Disbarment on Void Judgment.—Remedy.—Mandate.**—Where an attorney has been suspended from practice by a void judgment, mandate is a proper remedy to restore him to his rights.

**SAME.—Jurisdiction of Supreme Court.**—The Supreme Court has no jurisdiction to issue a writ of mandate compelling the judge of an inferior court to allow an attorney who has been disbarred in that court to practice therein.

**SAME.—Effect of Appeal and Supersedeas.**—A judgment suspending an attorney from practice executes itself, except as to the collection of costs, and is not affected by an appeal therefrom to the Supreme Court and the obtaining of a supersedeas, except as to costs; as such appeal and supersedeas do not authorize him to do any thing forbidden by the judgment of suspension.

Petition in the Supreme Court.

*C. S. Wesner, S. H. Buskirk and J. W. Nichol*, for petitioner.

*T. J. Terhune*, for respondent.

**BIDDLE, J.**—Petition by William B. Walls for a writ of mandate against Truman H. Palmer.

The material facts set forth in the petition may be stated as follows:

That, at the March term, 1871, of the Boone Circuit Court, now within the Twentieth Circuit, the petitioner was duly admitted to practice as an attorney and counsellor at law; that, from that time to the present, he has continued to practice as such in said court and circuit; that Truman H. Palmer is the judge of said circuit; that, on the 4th day of February, 1878, Thomas J. Terhune, in pursuance of an order previously made by the Boone Circuit Court, presented to the said court certain charges affecting the character of the petitioner as an attorney and counsellor at law, to which he appeared and answered by a denial; that the issues of fact thus found were submitted to a jury for trial, on the 8th day of March, 1878, which

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64	493
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resulted in a verdict against your petitioner; that a motion for a new trial was overruled, whereupon the court rendered a judgment suspending the petitioner from practising as an attorney and counsellor at law, from which judgment the petitioner appealed to this court, and filed his bond conditioned according to law; that, on the 6th day of May, 1878, the petitioner filed a transcript of the said proceedings and judgment in the clerk's office of this court, with the proper assignments of error thereon; that, within sixty days after filing said appeal bond, the petitioner obtained from one of the judges of this court an order staying proceedings upon the judgment of the court below, on the condition of filing a proper bond, according to law, which bond was filed and approved; that the September term of the Boone Circuit Court commenced on the 2d day of September, 1878; that petitioner is employed as counsellor in about fifty cases pending in said court; that, on the 6th day of September, 1878, the Hon. Truman H. Palmer, judge of said court, appeared in open court and entered upon the discharge of his duties as judge thereof; that, on the 9th day of September, while said judge proceeded with the call of the attorneys of said court for motions, said judge omitted to call the name of the petitioner as an attorney, although he represented a large number of litigants in said court; that said judge called and passed over certain cases in which the petitioner was employed as an attorney, and which were ready for trial, and proceeded to call and try causes in which the petitioner was not interested; that the petitioner thereupon claimed to have all the rights and privileges of an attorney in said court, and demanded that he should be permitted, as matter of right, to represent his clients, and proceed with the trial of causes in which he was retained, but said judge refused to recognize the petitioner as an attorney and counsellor of said court; that said judge has stated to cer-

tain persons that he did not intend to recognize the petitioner as an attorney and counsellor of said court, nor to allow him to practise therein.

Wherefore the petitioner prays for a writ of mandate against the said judge, commanding him to appear in this court and show cause why the petitioner shall not be permitted to practise as an attorney and counsellor at law in said court, and in the courts of the said Twentieth Judicial Circuit.

By the common law, and in the common-law courts, the power rested exclusively with the courts to determine who should practise therein as attorneys and counsellors at law; but it was a power to be regulated by a sound legal discretion in guarding the rights and privileges of the bar, as well as the dignity and authority of the court. *Ex parte Secombe*, 19 How. 9. In the State of Indiana this common-law power of the courts is regulated by statute. 2 R. S. 18-76, pp. 304, 306-309, secs. 771, 777, 778, 779, 780, 781. At common law an appeal would not lie from a judgment suspending or disbarring an attorney, but such an appeal in this State is granted by statute. Sec. 781, *supra*; *Ex parte Robinson*, 3 Ind. 52; *Whittem v. The State*, 36 Ind. 196.

When an attorney has been improperly suspended, or disbarred by a judgment which is a nullity, the writ of mandate is a proper remedy to restore him to his rights; but when he has been properly suspended or disbarred, the writ will not lie. The authorities, we believe, uniformly support the above propositions. *Ex parte Burr*, 9 Wheat. 529; *In the Matter of P. Gephard*, 1 Johns. Cas. 134; *Austin's Case*, 5 Rawle, 191; *The Commonwealth, ex rel. Brackenridge, v. The Judges of the Court of Common Pleas, etc.*, 1 S. & R. 187; *In re John Percy*, 36 N. Y. 651; *In the Matter of Mills, an Attorney*, 1 Mich. 392; *In the Matter of Francis Blake*, 107 Eng. C. L. 33; S. C., 3 Ellis & E. 34; *Withers v. The State*, 36 Ala. 252; *The People v. Turner*, 1 Cal.

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143; *Ex parte Bradley*, 7 Wal. 364; High Extraordinary Legal Remedies, secs. 216, 224; 1 Waits' Actions & Defenses, 433. We include in the above list the authorities cited on behalf of the petitioner, as we think they support our own views.

The petition in this case does not show that the judgment suspending the petitioner from the practice of his profession is improper; upon that ground, therefore, it is insufficient. But it is urged that the appeal and supersedeas, as set forth in the petition, by staying the judgment of suspension, has the effect of restoring the petitioner to his rights as an attorney and counsellor during the pendency of the appeal. There is no direct averment in the petition that the appeal and supersedeas, or either of them, are still pending and in force; and, if they were, we could not hold that they, or either of them, would have the effect contended for by the petitioner. To give them that effect, and grant the prayer of the petitioner, would be to reverse the judgment of the suspension by a writ of mandate before the appeal is judicially decided. The effect of the appeal and supersedeas is to stay the judgment of suspension as it is, and prevent further proceedings against the petitioner. It does not reverse, suspend or supersede the force of the judgment. That remains in all respects the same. The judgment itself requires no further execution than its own terms; it executes itself, except as to the collection of costs, which is stayed by the appeal and supersedeas. The only effect of an appeal to a court of error, when perfected and while pending, is to stay execution upon the judgment from which it is taken. *Montgomery v. Jones*, 5 Ind. 526; *Nill v. Comparet*, 16 Ind. 107; *Burton v. Reeds*, 20 Ind. 87; *Burton v. Burton*, 28 Ind. 342.

An appeal from a judgment will not authorize or allow the party appealing to do any act which, by the judgment, he is forbidden to do. *The State, ex rel. Matthews, v. Chase*, 41 Ind. 356.

But, if the petitioner had made a proper case to entitle him to the relief he seeks, the question, whether this court has the power to issue a writ of mandate in such a case, and grant relief in the manner it is prayed for, would still remain to be settled. That the judgment of suspension, if erroneous, should be reversed on appeal, can not be doubted. *Mattler v. Schaffner*, 53 Ind. 245.

The constitution provides, that "The Supreme Court shall have jurisdiction, co-extensive with the limits of the State, in appeals and writs of error, under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the General Assembly may confer." Art. 7, sec. 4. The only original jurisdiction conferred upon the Supreme Court by the General Assembly, as to writs of mandate, is by statute, as follows: "Writs of mandate and prohibition may issue from the Supreme and circuit courts, and courts of common pleas of this State; but such writs shall issue from the Supreme Court only when necessary for the exercise of its functions." 2 R. S. 1876, p. 295, sec. 788. Upon this statute the question arises: Is the writ of mandate prayed for in this case necessary for the exercise of the functions and powers of this court? Whether the petitioner be allowed or denied the right to practise as an attorney and counselor at law in the Boone Circuit Court, or in the Twentieth Judicial Circuit, of this State, is not a matter that can in any way possibly affect the exercise of the functions and powers of the Supreme Court. In the case of *The State, ex rel. Powell, v. Biddle*, 36 Ind. 138, a writ of mandate was asked of this court to direct the judge of a circuit court to proceed with a case pending in the court over which he presided, and denied for the want of power to grant it. It was held that the writ was not necessary for the exercise of the functions and powers of this court, and there-

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fore could not be allowed. This case appears to us to be much stronger than the one before us now.

The prayer of the petitioner must be denied. Judgment for costs.

NOTE.—This proceeding grew out of the case of *Ex Parte Walls*, ante p. 461.

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**CRIMINAL LAW.—Verdict.—Acquittal.**—A verdict of guilty as charged in one only of several counts in an indictment is, in effect, an acquittal on the other counts.

**SAME.—False Pretences.—Indictment.—False Report by Employee to Employer.**

—*Personating Fictitious Person.*—*Negligence of Agent.*—*Character of Pretences Used.*—An indictment against the "foreman of a gang of hands" laboring for the receiver of a railroad company charged the defendant with having made a false report, in writing, that a certain fictitious person was entitled to a certain sum for labor performed for the receiver as one of such "gang," and with having procured another to personate such fictitious person and receive from the paymaster of the receiver, of the moneys of the receiver, the amount due to such fictitious person as shown by the pay-roll which was founded upon, and made out pursuant to, and upon the faith of, such false report, with felonious intent to defraud, etc.

*Held*, that such an indictment is fatally defective for want of an averment that it was the duty of the defendant to employ such laborers for the receiver, and that such duty was known to the persons to whom he reported and to those whose duty it was to prepare the pay-roll.

*Held*, also, that a payment, by the paymaster, to him personating such fictitious person, without identification, was negligence with which the receiver was chargeable.

**SAME.—False Pretences in Obtaining Check.—Description of Check in Indictment.**—An indictment for obtaining a check calling for the payment of money, by means of false pretences, should describe the check by setting out its substance, at least, or allege a substantial reason for the failure to do so.

From the Jennings Circuit Court.

T. C. Batchelor, for appellant.

T. W. Woollen, Attorney General, and W. G. Holland,  
Prosecuting Attorney, for the State.

Howk, C. J.—At the March term, 1878, of the Jennings Circuit Court, the appellant was indicted for obtaining a certain thing of value by certain false pretences.

The indictment contained two counts.

The appellant moved the court to quash the indictment, which motion was overruled, and to this ruling he excepted. On arraignment, his plea to the indictment was, that he was not guilty as therein charged.

The cause was tried by a jury, and a verdict was returned finding him guilty as charged in the first count of the indictment, and assessing his fine at one cent; and that he be imprisoned in the state-prison for the term of two years.

His motion for a new trial having been overruled, and his exception entered to this decision, judgment was rendered against him by the court, upon and in accordance with the verdict.

From this judgment he has appealed to this court, and has here assigned, as errors, the following decisions of the circuit court:

1. In overruling his motion to quash the indictment; and,

2. In overruling his motion for a new trial.

1. In considering the questions arising under the first alleged error, it will be observed that the verdict of the jury was entirely silent as to the second count of the indictment. This silence of the verdict was equivalent to an express verdict of not guilty as to the second count of the indictment. *Weinzorpfli v. The State*, 7 Blackf. 186, and, *Bittings v. The State*, 56 Ind. 101. It follows, therefore, that the only question for decision, under the first alleged error, is the sufficiency in law of the first count of the indictment.

Omitting merely formal and introductory matters, the first count of the indictment charged, in substance, that



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the appellant, Charles D. Bonnell, "from the 1st day of August, 1877, until the 15th day of September, 1877, was in the employment and service of John King, Jr., who was then, and during all of said time, the receiver of the Ohio and Mississippi Railway Company, and was then and there, and during all of said time, a part of the business and duty of said Charles D. Bonnell to act and be the foreman of a gang of hands and carpenters, engaged in work under his charge, for said John King, Jr., as such receiver, on the main line of said railway from Osgood to Mitchell, and on the branch line of said railway from North Vernon to Louisville; that, among other things, it was the duty and business of said Charles D. Bonnell, in that behalf, to keep a correct list of the hands in his gang, the number of days each was engaged in labor on said railway, the rate of wages at which each worked, and to make weekly and monthly reports thereof, showing the whole number of days each had worked, at the end of each month, and the total amount due each of said hands for labor on said railway during said month, which said reports the said Charles D. Bonnell, as such foreman, had to make to one Enoch S. Duval, who was, during all of said time aforesaid, also in the employment of said John King, Jr., as such receiver, and whose business it was, in part, to receive and approve the said reports required of the said Charles D. Bonnell, and forward them, with his approval, to one Samuel R. Johnson, who was also, during all of the time aforesaid, in the employment of said John King, Jr., as such receiver, whose business it was to make out, from said reports aforesaid, the pay-rolls for the said gang of hands under the foremanship of the said Charles D. Bonnell, and forward said pay-rolls to one Andrew Donaldson, who was also, during all of the time aforesaid, in the employment of said John King, Jr., as such receiver, and whose business it was to pay to each of the said hands in said

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gang the amount so shown to be due to them. And the grand jury further find and present, that, during the said month of August, 1877, the said Charles D. Bonnell did make said weekly and monthly reports, as he was required to do as such foreman, of the time worked by each hand in his said gang of hands, on the said railway, to the said Enoch S. Duval, and in each of said reports the name of 'W. S. Jones' was made to appear by said Charles D. Bonnell as one of the hands in said gang. Particularly did the said Charles D. Bonnell make a monthly report thereof to the said Enoch S. Duval, in the said county of Jennings, on the 31st day of August, 1877; and the said grand jury presents, that, in the said monthly report, the said Charles D. Bonnell did then and there and thereby unlawfully, feloniously, designedly and with intent to defraud the said John King, Jr., as such receiver, falsely, designedly and intentionally place in said report the name 'W. S. Jones,' and did thereby report that the said 'W. S. Jones' had worked in the gang on said railway for seventeen days, during said month of August, A. D. 1877, and that his total wages was \$34.51, which said report was received and approved by the said Enoch S. Duval, who confided in and believed said report to be true, and who then and there well knew that the said Charles D. Bonnell was so in the employment, in the capacity of such foreman, of the said John King, Jr., as such receiver; that said Enoch S. Duval then forwarded the said report to the said Samuel R. Johnson, who then and there confided in and believed each of said reports to be true, well knowing that the said Charles D. Bonnell and the said Enoch S. Duval were each in the service, as aforesaid, of the said John King, Jr., as such receiver; that the said Samuel R. Johnson then made up the said pay-roll for the said gang of hands, including the said name of the 'W. S. Jones,' upon the faith reposed in said reports, and forwarded the same to the said Andrew

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Donaldson, who knew that the said Charles D. Bonnell, the said Enoch S. Duval, and the said Samuel R. Johnson were, during all of said time, in the employment of said John King, Jr., as such receiver, and, so knowing, the said Andrew Donaldson believed the said pay-roll to be correct, and gave full faith and credit to the said pay-roll made from the said reports, by which it was shown that the said John King, Jr., as such receiver, was indebted to 'W. S. Jones,' as aforesaid, in the sum of \$84.51. And the grand jury aforesaid further find and present, that, in truth and in fact, there was no such man as 'W. S. Jones' in the gang of hands under the direction of the said Charles D. Bonnell, as such foreman, during the whole or any part of the said month of August, A. D. 1877, nor was there any man in said gang, during said time, who answered to the name of 'W. S. Jones,' but that the said 'W. S. Jones' was sham and fictitious, and inserted and carried on said reports by said Charles D. Bonnell, as such foreman, designedly and with the intent to defraud the said John King, Jr., receiver as aforesaid. And the grand jury further present, that, in furtherance of the said intent and design of the said Charles D. Bonnell to defraud the said John King, Jr., as such receiver, the said Charles D. Bonnell, at the said county of Jennings, in the State of Indiana, and on the 15th day of September, A. D. 1877, did then and there procure one Lon King to personate and represent himself to be the said 'W. S. Jones,' named and represented, as aforesaid, in the reports of the said Charles D. Bonnell, as aforesaid, and the said Lon King, in obedience to the request and commands of the said Charles D. Bonnell, did then and there, for and on behalf of the said Charles D. Bonnell, present himself to the said Andrew Donaldson, paymaster, as aforesaid, for the said John King, Jr., receiver as aforesaid, and represent himself to the said Andrew Donaldson to be 'W. S. Jones,' and did then and

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there, and in that assumed character, and in obedience to the instructions given him by the said Charles D. Bonnell, as aforesaid, then and there receive from the hands of the said Andrew Donaldson, for and on behalf of the said Charles D. Bonnell, as such paymaster, the check of the said John King, Jr., as such receiver, upon the 'Commercial Bank, of Cincinnati,' for the sum of \$34.51, which check was then and there of the value of \$34.51. Wherefore the grand jury say, that, in reporting the said fictitious 'W. S. Jones' upon his weekly and monthly rolls, as aforesaid, representing that the said receiver aforesaid was indebted to the said 'W. S. Jones,' in form as aforesaid, and in procuring the said Lon King to aid him in perfecting the said fraud, in form aforesaid, in obtaining the check aforesaid, as aforesaid, the said Charles D. Bonnell was then and there guilty of obtaining from the said John King, Jr., receiver as aforesaid, his check on the 'Commercial Bank of Cincinnati,' for \$34.51, and then and there of the value of \$34.51, with the intention, then and there and thereby, to feloniously and designedly defraud the said John King, Jr., receiver of the said Ohio and Mississippi Railway Company, contrary to the form of the statute made and provided."

It will be readily seen from the indictment in this case, that it was intended to charge the appellant, therein and thereby, with the commission of the felony which is defined, and the punishment therefor prescribed, in and by section 27 of "An act defining felonies, and prescribing punishment therefor," approved June 10th, 1852. In said section 27 it is provided as follows:

"Sec. 27. If any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, transfer, note, bond or receipt, or thing of value;

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such person shall, upon conviction thereof, be imprisoned in the state-prison not less than two nor more than seven years, and fined not exceeding double the value of the property so obtained." 2 R. S. 1876, p. 486.

We pass now to the consideration of the objections urged by the appellant's counsel to the sufficiency of the indictment. We will consider and pass upon the objections, in the same order in which they have been presented.

In his brief of this cause, the appellant's counsel says: "It will be observed, that the indictment nowhere charges, in express terms or by implication, that it was any part of the duty or business of the defendant, Bonnell, to employ the members of his gang, for John King, Jr., receiver, in the one case, or for the Ohio and Mississippi Railway, in the other. Now, unless the designation of the defendant's duty, under the term 'foreman,' implies the power and duty to employ the members of his gang, then not only is there no averment that such was a part of his duty, but the fair inference is that it was no part of his duty, that inference being drawn from the use of the word 'foreman.'"

This objection to the indictment is well taken. The term "foreman," as used in the indictment, does not imply, *ex vi termini*, that it was the duty of the appellant, or that he had the power, simply as foreman of a gang of laborers, to employ the laborers, or any of them, over whom he acted as foreman. If it was his duty, and if he had the power, as such foreman, to employ the laborers who constituted his gang, over whom he was placed as foreman, and of whom, and of the number of days each of them worked, and of the rate of wages each was entitled to, he was required to keep a correct list, and make weekly and monthly reports thereof, it is quite clear, we think, that it should have been alleged in the indictment, that such was

his duty and such was his power in the premises. And coupled with the foregoing allegation, it should have been charged in the indictment, that each of the officers or agents of said John King, Jr., receiver, etc., through whose hands the appellant's weekly and monthly reports were required to pass, knew that it was the duty of the appellant, and that he was authorized, to employ the laborers in his gang; and that, for this reason, each of the said officers or agents had the right to rely, and did rely, upon said weekly and monthly reports for information, as well as to the names of the laborers in the appellant's gang, as to the number of days each had worked, and the rate of wages each was entitled to.

It was not the appellant's duty, and if he had no power to employ the laborers in his gang, the fair and reasonable inference would be that such duty was incumbent upon, and such power was possessed by, some other agent or agents, servant or servants of said John King, Jr., receiver; and, in that event, it would seem to be reasonable, that such other agent or agents, or servant or servants, should keep true and correct lists of the persons so employed by him or them, the date of their employment, and of such other particulars, including their names, as would clearly identify them, and should examine and verify the weekly and monthly reports of the foreman of a gang of laborers, before any payment should be made to any of such laborers. It seems to us, that, in a great enterprise like the Ohio and Mississippi Railway, extending for hundreds of miles through and into four of the largest States of the Union, and whose agents and servants are numbered by the thousand, there should be some officer, agent or servant clothed with the duty, and possessed of the power, to employ the necessary laborers, and keep registers or rolls of their names, and of other proper particulars in regard to them. If the appellant was clothed with this duty, and

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possessed of this power, in regard to the gang of laborers of which he was foreman, the fact should have been alleged in the indictment. But if, on the contrary, the appellant was not, and some other officer, agent or servant was, clothed with such duty and possessed of such power, then it seems to us, that common prudence would have required that the appellant's weekly and monthly reports should have been referred to such other officer, agent or servant for examination, verification and identification of the laborers named in said reports, before any pay-roll was made up therefrom.

It is the settled law in this State, that, in such a case as the one now before us, the false pretences upon which the indictment is predicated, must be such as would deceive a person of ordinary caution and prudence. "The pretences must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property, and to which a person of ordinary caution would give credit." *The State v. Magee*, 11 Ind. 154; *Johnson v. The State*, 11 Ind. 481; *The State v. Orvis*, 13 Ind. 569; *Jones v. The State*, 50 Ind. 473; *Keller v. The State*, 51 Ind. 111; and *Clifford v. The State*, 56 Ind. 245.

In the case at bar it will be observed, that the indictment charged, that the appellant procured "one Lon King to personate and represent himself to be the said 'W. S. Jones,'" the fictitious name and person mentioned in the appellant's weekly and monthly reports. Now, it may be presumed, that Andrew Donaldson, the paymaster of said John King, Jr., receiver, did not know "W. S. Jones," the fictitious person, or Lon King, the real person, who was to personate and represent himself to be "W. S. Jones." If the paymaster, Donaldson, who was the servant, and, for the time being, was the representative, of John King, Jr., receiver, did not personally know "W. S. Jones," the fictitious person, nor Lon King, who personated

"Jones" for the time being, in the matter now under consideration, we are clearly of the opinion, that the paymaster, Donaldson, was guilty of negligence, in delivering to said Lon King, without identification of any kind, and especially without identification by the appellant, as foreman, of the check for thirty-four dollars and fifty-one cents, prepared for and in the name of "W. S. Jones." Of course the negligence of the servant, Donaldson, in this particular, must be regarded as, and held to be, the negligence of the principal, John King, Jr., receiver. It was not claimed nor charged in the indictment, that the appellant had in any manner, to the paymaster, Donaldson, or to any other person, represented the said Lon King to be the fictitious person, "W. S. Jones." The act of Donaldson, the paymaster, in delivering the check for "W. S. Jones" to Lon King, was the act of his principal, John King, Jr., receiver, the prosecutor of the appellant in this suit. It was, as we have seen, a negligent act. If the paymaster, Donaldson, had possessed and used ordinary caution and prudence, in the transaction of his duty and business, we may fairly and reasonably assume, the contrary not appearing, that the check prepared for and in the name of "W. S. Jones" would have never been delivered to Lon King. The false representation made by Lon King, and his false impersonation of the fictitious "W. S. Jones," under the circumstances and surroundings of the transaction, ought not to have deceived any person of ordinary caution or prudence, and ought not to have induced John King, Jr., receiver, or his servant and paymaster, Donaldson, in the absence of any investigation and without any enquiry of any kind, to have parted with the check, made and prepared for "W. S. Jones," to an absolute and total stranger, Lon King, upon his naked and unsupported declaration that he was "W. S. Jones."

We are clearly of the opinion, that the false pretences of



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the appellant, upon which the indictment against him is predicated in this case, were not of such a character, as the same are stated and set forth, and without other and further allegations, in the indictment, as would or ought to induce a person of ordinary caution and prudence to part with his property to an utter stranger, merely upon his declaration that his name was "W. S. Jones," and without any reference, voucher or even enquiry as to his identity. It seems to us, that the loss of property, by the prosecutor in this case, was the result rather of his own negligence in the transaction than of any false pretences by or of the appellant.

In the case of *Smith v. The State*, 33 Ind. 159, the doctrine was laid down, and we think correctly, upon the authority there cited, "that the property obtained under a false pretence must be described with as much accuracy and particularity as goods stolen must be in an indictment for larceny." In the case at bar, the property alleged to have been obtained for and on behalf of the appellant, from the hands of the paymaster, Donaldson, by means of the false pretences charged in the indictment, was described therein as follows :

"The check of the said John King, Jr., as such receiver, upon the 'Commercial Bank of Cincinnati,' for the sum of \$34.51, which check was then and there of the value of \$34.51."

It will be observed, that the indictment contained no allegation of the loss or destruction of the check in question, nor was it alleged therein that the contents of said check were unknown to the grand jury, nor was any reason or excuse given for not setting out the substance of the check, nor was it stated, that, for any cause, a more particular description of the check could not be given, than was given in the indictment. Under these circumstances it is very certain, we think, that the check alleged to have been ob-

tained, for and on behalf of the appellant, by means of the false pretences charged in the indictment, was not described therein with sufficient accuracy and particularity, to conform to the requirements of law. If the check was in existence, and in the possession or under the control of the prosecutor, the substance thereof should have been set out in the indictment. If the check had been lost or destroyed, or if for any reason the substance thereof could not be set out, the facts in regard to it, and the contents of the check, should have been given in the indictment, as clearly and fully as they could be ascertained by the grand jury; and if they, or any of them, were unknown to the grand jury, that fact should have been stated in the indictment. In this case, the check charged to have been obtained by means of the alleged false pretences was described with exceeding vagueness, inaccuracy and uncertainty. The amount and value of the check, and the bank upon which it was drawn, are stated with certainty, but the indictment contains no other particulars in regard to said check. Its date is not given, nor was it alleged therein whether it was payable to bearer, or to order, or to a certain named person, and if so, to whom it was made payable. Indeed, from the description given of the check, it is not absolutely certain by whom it was made or executed. It is described as "the check of the said John King, Jr., as such receiver." It is certain, from this description, that the check was the property of "the said John King, Jr., as such receiver," but it does not necessarily follow, from the description given, that the check was made or executed by "the said John King, Jr., as such receiver." For, it is clear that a check made or executed by some other person might have become, in the regular course of business, the property, and therefore "the check, of the said John King, Jr., as such receiver." From what we have said, it will be readily seen that the property charged to have been obtained, under or by means

of the alleged false pretences, was not described with any sufficient accuracy or particularity in the indictment in this case.

In another view of the question, it seems to us that the defective description of the check injuriously affected the indictment in this case. Of course it is necessary, in a case of this character, that the indictment should show, clearly and beyond doubt, that, by means of the false pretences charged therein against the defendant, the prosecutor has suffered some loss. In this case it is charged in the indictment that Lon King, for and on behalf of the appellant, obtained from the paymaster, Donaldson, a check for \$34.51, but it is not alleged to whom this check was made payable. It was not alleged that the check thus obtained was a check made and prepared and intended for the fictitious "W. S. Jones;" indeed, it was not alleged in terms, but is left merely to inference, that the check in question, obtained by Lon King for and on behalf of the appellant, was not made, prepared and intended for the appellant, and payable to him or his order. If the substance of the check had been set out, or if it had been fully described, or its contents given, in the indictment, it might then have appeared therein whether or not Lon King had obtained for the appellant the check made, prepared and intended for the fictitious "W. S. Jones," and not for the appellant. But, in the absence of the substance of the check, or of its contents, and of any averments to that effect in the indictment, we cannot assume or infer that the check, obtained by Lon King for the appellant, was a check not intended for the appellant, but one made, prepared and intended for the fictitious "W. S. Jones," if there was any such check.

For the reasons given, we think that the circuit court erred in overruling the appellant's motion to quash the indictment.

The conclusion we have reached, in regard to the insuff-

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ficiency of the indictment in this case, renders it unnecessary for us to consider any of the questions arising under the second alleged error, the overruling of the appellant's motion for a new trial. The evidence on the trial is not in the record, and, in the absence of the evidence, it is difficult to determine satisfactorily the appellant's objections to the instructions of the court, as mere abstract legal propositions.

The judgment is reversed, and the cause remanded, with instructions to sustain the appellant's motion to quash the first count of the indictment; and the clerk of this court will issue the proper notice for the return of the appellant to the sheriff of Jennings county.

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NOLL v. SMITH.

**PROMISSORY NOTE.—Payable in Bank.—Contract Susceptible of being Altered Into a Note.—Negligence.—Bona Fide Holder.** One who, in executing what he understands to be, and is, a contract other than a promissory note, executes an instrument which may be so mechanically separated as to present an apparently perfect promissory note payable in bank and bearing his signature as maker, is guilty of negligence, and is liable thereon to a *bona fide* endorsee thereof, for value and before maturity.

From the Warren Circuit Court.

*F. M. Sutton* and *J. W. Sutton*, for appellant.

*J. McCabe*, for appellee.

NIBLACK, J.—William C. Smith, as the endorsee and holder, sued Benjamin Noll on two promissory notes, as follows :

“\$180. WARREN COUNTY, IND., May 11th, 1875.

“Nine months after date, I promise to pay to the order of Charles DeWolf, at the First National Bank of Attica, Indiana, one hundred and eighty dollars, with interest at

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the rate of ten per cent. per annum from date, value received, without any relief from valuation or appraisement laws. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note, or before if made from the sale of machine.

BENJAMIN NOLL."

"\$180. WARREN COUNTY, IND., May 11th, 1875.

"Nine months after date, I promise to pay to the order of Charles DeWolf one hundred and eighty dollars, payable at the First National Bank of Attica, Indiana, or before if made from the sale of the machine, value received, without any relief from valuation or appraisement laws. Interest at ten per cent. from date. BENJAMIN NOLL."

Both these notes were endorsed to the plaintiff.

The complaint was in two paragraphs, one paragraph on each note, and separate demurrers were overruled to both paragraphs.

The defendant answered in three paragraphs :

1. Admitting the execution of the notes, but averring that there was a condition annexed to both notes, that they were not to be paid unless the defendant sold machines, known as "Charles Green's Check Rower," for planting corn, equal to the amounts of said notes, and within the time limited for the payment thereof; that said condition and notes were written on the same paper; that said notes have been altered, in this, that the said condition has been taken off said notes, since the signing and delivery thereof, by some person unknown to, and without the knowledge or consent of, the defendant.

2. Averring that the notes sued on were given to vend "Charles Green's Check Rower," a machine for planting corn, in a certain township in Warren county; that, when said notes were executed, they had a condition annexed to them that they were not to be paid if defendant's sales of said machines, within the time limited for the payment of

such notes, were not equal to the amounts of the notes; that said notes and condition were written on the same paper, and were delivered as one instrument; that said condition has since been taken off from said notes, without the knowledge or consent of the defendant, by some person unknown to him. Wherefore the notes sued on are not the instruments in writing executed and delivered by the defendant.

3. Setting up that the notes sued on were given for the right to vend "Charles Green's Check Rower," a machine above described, and that the words in said notes, "or before, if made from the sale of the machine," had reference to the sale of said machine; that said notes had a condition annexed thereto, that they were to be paid within the time limited, or before, if the profits upon the sales of machines equalled the amounts of the notes; that said condition fully set forth the meaning of said words, "or before, if made from the sale of the machine;" that the notes sued on were not the instruments signed and delivered by the defendant, because said condition has since been taken off, without the defendant's knowledge or consent.

The plaintiff demurred to each paragraph of the answer, and his demurrer was overruled to the first and second paragraphs, and sustained to the third paragraph.

The plaintiff then replied to the first and second paragraphs of the answer, that the First National Bank of Attica, at which the notes in suit were payable, was a national bank, having an actual existence and doing business in this State at the time said notes were executed, which facts were known to the plaintiff when said notes were endorsed to him, and that said bank still existed and continued to do business in this State; that the plaintiff became the purchaser of said notes in good faith and for a valuable consideration, before their maturity, in the regu-

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lar course of his business, and without any knowledge whatever, on his part, of the facts set up in said paragraphs of the answer; that, if any condition was annexed to said notes, as alleged, it was either written on a separate paper, or, if written on the same paper, so written and formed as to be unmistakably intended, from the appearance thereof, to constitute a separate instrument from each of said notes, as if written on a separate paper, because both of said notes were in the form and similitude of ordinary printed blanks for promissory notes, filled up in writing; that the printed blanks had been, so formed as to leave a dotted line at the bottom of each, for the signature of the maker of such notes, in which the defendant's name was placed in each of said notes; that outside the body of said notes there was printed a plain and distinct border, by means of two distinct lines close together; that the condition set up by the defendant was not written either upon the back or face of said notes, or either of them, or upon the white space left upon said notes outside of the black border lines above described, and, if written on the same paper with the notes, was written so far away from said black line border as to leave the white space aforesaid untouched, and to allow any person to separate said condition from both of said notes, leaving each of them perfect in form and appearance as regular commercial paper; that such was the form and appearance of said notes when he, the plaintiff, purchased the same; that the defendant had been guilty of gross negligence in putting said notes in circulation, trusting the persons in whose hands they might come not to remove said condition, and not to put such notes on the market as commercial paper, with such condition detached.

The defendant demurred to this reply, but his demurrer was overruled.

The cause being submitted to the court for trial, there was a finding and judgment for the plaintiff.

Errors are assigned :—

- 1st. On overruling the demurrer to the complaint ;
- 2d. On the sustaining of the demurrer to the third paragraph of the answer ;
- 3d. On the overruling of the demurrer to the reply.

The appellant, in his argument here, has not discussed the sufficiency of the complaint, or of the third paragraph of his answer. We are hence relieved from the consideration of the questions raised by the first and second assignments of error. See, however, *Walker v. Woollen*, 54 Ind. 164.

We understand the general rule to be that the removal or detachment of a material condition annexed to, or forming a part of, a negotiable note, without the knowledge or consent of the maker, will ordinarily be a sufficient defence to such note, even in the hands of an innocent holder, and especially when such removal or detachment is made under circumstances which put the purchaser of the note fairly upon his inquiry as to the altered condition of the note, and this we construed to be the doctrine of the case of *Cochran v. Nebeker*, 48 Ind. 459, cited and discussed by the appellant ; but that, when the note and condition are negligently so executed by the maker that the condition may easily be removed, without in any manner mutilating or defacing the note, and the note is thus, without objection, put in circulation in that form, the maker can not be heard to deny his liability to pay the note in the hands of an innocent holder, notwithstanding the condition may have been detached from it before such innocent holder became the owner of it. Such was, in substance, the decision of this court in the case of *Cornell v. Nebeker*, 58 Ind. 425. See, also, *Woollen v. Ulrich*, ante, p. 120, approving and following that case.



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Upon the authority of these last named cases, the judgment in this case will have to be affirmed.

The judgment is affirmed, with costs.

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#### HOWARD v. THE STATE.

**CRIMINAL LAW.—Professional Gambler.—Affidavit.—Evidence.**—In a prosecution before the mayor of a city, under section 3 of the act of March 15th, 1877, Acts 1877, Spec. Sess., p. 80, which section defines a professional gambler, the affidavit alleged, that, at, etc., on a certain day, "and at divers times" thereafter, the defendant did "then and there unlawfully frequent, for the purpose of gaming with cards, a certain place in said county where gambling was then permitted, to wit, a certain room then and there occupied by one" S. S., etc.

*Held*, that the affidavit is sufficient.

*Held*, also, that it is not necessary to aver or prove that the defendant actually engaged in gaming.

From the Wayne Circuit Court.

*J. Yaryan, J. L. Yaryan and S. A. Forkner*, for appellant.

*T. W. Woollen*, Attorney General, and *H. U. Johnson*, Prosecuting Attorney, for the State.

**WORDEN, J.**—This was a prosecution commenced and tried before the Mayor of the City of Richmond, and appealed to the Wayne Circuit Court, where the cause was tried by a jury, resulting in a conviction and a fine of twenty-five dollars.

The affidavit on which the prosecution was based was as follows:

"STATE OF INDIANA, Wayne County, ss.:

"Personally appeared before the undersigned, Mayor of the City of Richmond, in said county and State, this 11th day of August, 1877, Thomas Yeager, of lawful age, who, being by me first duly sworn according to law, deposes and

says that George Howard, late of Wayne county, Indiana, did, at said county, on the 1st day of June, 1877, and at divers times from that day and date, up to the filing of this affidavit, then and there unlawfully frequent, for the purpose of gaming with cards, a certain place in said county, where gambling was then permitted, to wit, a certain room then and there occupied by one Samuel Sands, in the old Fremont House building, on the north-east corner of Main and Fifth streets, in said city of Richmond, in the county and State aforesaid, contrary," etc.

The appellant made motions to quash the affidavit, for a new trial, and in arrest of judgment, which were severally overruled, and exceptions taken.

The prosecution was based upon the 3d section of the act of March 15th, 1877, Acts 1877, Spec. Sess., p. 80, which provides as follows:

"Any person, who, for the purpose of gaming with cards or otherwise, travels about from place to place, or shall frequent any place where gambling is permitted, shall be deemed a professional gambler."

The penalty prescribed, on conviction of being a professional gambler, is a fine of not less than twenty-five dollars, nor more than one hundred dollars, as is provided for by the 9th section of the act.

In the case of *The State v. Newton*, 59 Ind. 178, it was held that the provisions of the above mentioned act, which create offences and prescribe punishment, are constitutional and valid; while some of its provisions for securing the punishment may not be. The prosecution in this case, however, seems to have been carried on under the general provisions of law for State prosecutions, and not under the peculiar provisions of that statute.

The affidavit was duly filed before the mayor, on which process was issued, by virtue of which the defendant was arrested and brought into court. The proceedings seem to have been entirely regular.

Several objections are made to the affidavit, which we proceed to consider.

First, it is objected, that the affidavit is bad because it does not state the name of the person by whom the gambling was permitted, at the place mentioned. Conceding, without deciding, that it was necessary to state such name, we think it was stated. The affidavit stated that the room, the place, where the gambling was permitted, was then and there occupied by Samuel Sands. This **must be** taken to have been a legal occupancy; and it **must be** assumed, that Sands, for the time being at least, had the right to control the use of the room. He therefore had the right to prohibit gambling in it; and, if gambling was permitted in it, did not Sands permit it? Clearly he did. No one else could have given the permission.

It is further objected, that the affidavit should have specified the kind of gambling which was permitted in the room, and that the appellant frequented the room for the purpose of gaming with cards, at the kind of game that was permitted therein. This was clearly unnecessary. If the defendant frequented the room for the purpose of gaming with cards, it was wholly immaterial what kind of a game at cards was permitted, or what kind the defendant frequented the room to play at.

It is also objected, that the affidavit should have alleged, and the evidence should have shown, that the defendant actually gambled at the place thus charged to have been frequented by him, in order to make out a case within the statute. We are of a different opinion. The statute does not require that he should have gambled, in order to make out the offence.

The offence consists in frequenting the place where gambling is permitted, for the purpose of gaming with cards or otherwise. Actual gaming would of course be strong evidence of the purpose of frequenting the place, but

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would not be necessary to the completion of the offence. A party might frequent the place where gaming is permitted, for the purpose of gaming with cards or otherwise; and yet some thing might occur at each visit to prevent his gaming. The offence would, nevertheless, be as perfect as if he had gambled. The case is much like that of *The State v. Miller*, 5 Blackf. 502.

There the indictment charged, that the defendant kept a room "to be used and occupied for gambling," but did not allege that any gambling had taken place in it. The statute made it an offence to keep a room; etc., "to be used and occupied for gambling." The indictment was held good. The court said: "The objection urged against the indictment is, that it does not allege that gambling had actually taken place in the room charged to have been kept for the purpose of gambling. This objection can not be sustained. The offence created by the statute is the keeping or renting of a room, etc., with the intention and purpose that gambling shall be carried on in it. The intention is a matter of proof; and if that can be established, it is immaterial whether the prohibited establishment shall find customers or not."

It is furthermore objected, that the words in the affidavit, "where gambling was then permitted," are "not a statement of a fact, but a mere conclusion, drawn from the facts." There is nothing in this objection. The averment, that "gambling was then permitted," was an averment of fact, and not a mere conclusion or inference.

No objection is made on the ground of the admission or exclusion of evidence, or to the charges of the court. There was a mass of evidence which sustains the verdict, and we find no error in the record.

The judgment below is affirmed, with costs.

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Cooper v. The Board of Commissioners of Howard County.

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COOPER v. THE BOARD OF COMMISSIONERS OF HOWARD COUNTY.

PAUPER.—*Contract by County Board, with Physician.—Action on Account, for Extra Services for Non-Resident Paupers.*—In an action on account, by a physician, against the board of commissioners of a county, to recover for professional services rendered by the plaintiff for certain alleged non-resident paupers, the defendant pleaded and proved that the plaintiff, during the time such services were rendered, was employed by the defendant, at a specified salary, pursuant to a contract in writing, to “do all the pauper practice in” a certain township, “including the county asylum and jail,” and “to present no claims or demands for any extra charges.”

*Held*, that, by the contract, the plaintiff was bound on the application of the proper officers, to treat non-resident paupers within such township without extra charge.

RECORD.—*Motion for New Trial.—Bill of Exceptions.*—A motion for a new trial is part of the record, without a bill of exceptions.

SAME.—*Instruction to Jury.*—An instruction to a jury, which is signed by the judge, and at the close of which a party has objected and excepted in writing, over the signature of his attorney, is part of the record, without a bill of exceptions.

From the Howard Circuit Court.

*J. C. Blacklidge and W. E. Blacklidge*, for appellant.

*J. O'Brien and M. Garrigus*, for appellee.

PERKINS, J.—Dr. William B. Cooper sued the Commissioners of Howard county, Indiana, upon a bill of particulars, for medicines and visits, as a physician, to certain named persons, amounting to \$196. He averred in his complaint, that said persons were paupers in said county, without stating in what township, but were non-residents of the county.

The Commissioners answered:—

1. The general denial;
2. Setting up the following contract, claiming that the services sued for were embraced by it:

“Know all men by these presents, that we, the undersigned, are held and firmly bound to the county of Howard, in the State of Indiana, in the penal sum of one thousand

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dollars, for the payment of which we bind ourselves jointly and severally. Witness," etc.

" This obligation to be void upon the following condition, to wit: Whereas William B. Cooper has agreed with the Board of Commissioners of said county, that he will, for the term of two years from the date hereof, do all the pauper practice in Centre township in said county, including the county asylum and jail, and furnish all necessary and proper medicines and surgical aid for disease and injuries of every kind, and also midwifery included. And said William B. Cooper further agrees to present no claims or demands for any extra charges. And the said William B. Cooper further agrees to render the service above indicated promptly upon the reasonable request of the proper authorities, for which the county of Howard agrees to pay, in quarterly instalments, the sum of five hundred and fifty-nine dollars, for said term of two years; and it is further agreed, if the said William B. Cooper shall fail or refuse to render, at any time, the services above required of him by the terms of the contract, upon reasonable and proper request, the said county shall be at liberty to employ any other physician and surgeon for the given case, and the cost and expense thereof to be deducted from the amount agreed to be paid to the said William B. Cooper."

The agreement was duly executed.

Reply, in general denial of the second paragraph of answer.

Trial by jury, to whom, before their retirement, the court gave the following instruction, viz.:

" Under the contract made by the plaintiff, with the board of commissioners, to do the pauper practice of Centre township, including the jail and county asylum, furnish medicine, perform surgery and midwifery, he was bound to treat non-inhabitants of the county of Howard, as well as

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inhabitants; the transient poor and destitute, as well as those having a settlement within the county; and, if the medical services claimed for in this action were rendered in Centre township, of Howard county, within the period of time covered by the contract, the plaintiff is not entitled to recover therefor in this action. C. N. POLLARD, Judge."

"Given by the court, and excepted to by the plaintiff at the time.

Blacklidge & Blacklidge,

"Attorneys for Plaintiff."

Thereupon the jury retired to consult of their verdict.

The jury found for the defendant, and answered interrogatories propounded by the plaintiff, as follows:

1. "Were the persons, to whom plaintiff rendered medical services, (if such services were rendered,) residents of the county of Howard, at the time such services were rendered?"

Ans. "W. W. Ryan was not a resident."

2. "Were such services rendered (if they were rendered) upon the order of the acting trustee of Centre township, and superintendent of the county asylum of Howard county?"

Ans. "They were."

The plaintiff filed a motion for a new trial, stating the following reasons therefor:

1. Verdict contrary to law;
2. Verdict contrary to evidence; and,
3. Error of the court in giving its instruction to the jury.

The motion was overruled, and judgment rendered on the verdict, to which the plaintiff entered an exception.

It is assigned for error, that the court erred in overruling the motion for a new trial.

There is no bill of exceptions in the record. But the motion for a new trial is a part of the record without a

bill of exceptions. *Kirby v. Cannon*, 9 Ind. 371. And the instruction was properly made a part of the record in one of the statutory modes. Sec. 325, 2 R. S. 1876, p. 168. We can not say, from what appears in the record, that the first and second causes or reasons for a new trial existed.

The third reason, viz., the giving by the court to the jury, of the single instruction above copied, depends upon the construction to be given to the contract set forth in the answer.

Section 8, p. 63, 1 R. S. 1876, is as follows :

“ It is hereby specially made the duty of such board to contract with one or more skilful physicians, having knowledge of surgery, to attend upon all prisoners confined in jail, or paupers in the county asylum, and may also contract with physicians to attend upon the poor generally in the county, and no claim of a physician or surgeon for such services shall be allowed by such board except in pursuance of the terms of such contract, provided that the foregoing section shall not be so construed as to prevent the overseers of the poor or any one of them, in townships not otherwise provided for, from employing such medical or surgical services as paupers within his, or their jurisdiction, may require.”

In the act for the relief of the poor, it is made the duty of the overseers of the poor to provide for such as are transient. Sections 12 and 13 of said act are as follows, 1 R. S. 1876, p. 679 :

“ Sec. 12. If any one within the description of poor persons specified in this act, shall be found in any county or township and the overseers of the poor of such township shall be unable to ascertain and establish the last place of legal settlement of such person, they shall proceed to provide for such poor person in the same manner as other persons are hereby directed to be provided for.



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"Sec. 13. Whenever any person entitled to temporary relief as a pauper, shall be in any township in which he has not a legal settlement, the overseers of the poor thereof may, if the same is deemed advisable, grant such relief by placing him or her temporarily in the poor-house of such county, if there be any, to be employed therein so far as he or she is capable of any employment."

It is clearly shown that the medical services were rendered to paupers, at the time in Centre township. This being so, the services were embraced by the contract set up in the answer. *Reiniche v. The Board of Commissioners, etc.*, 20 Ind. 243, we think in point.

The contract in *The Board of Commissioners, etc.*, v. *Rogers*, 17 Ind. 341, does not appear to have been as comprehensive as that in the present case. See *The Board of Commissioners, etc.*, v. *Boynton*, 30 Ind. 359; *Conner v. The Board of Commissioners, etc.*, 57 Ind. 15.

The court did not err in its instruction, nor in overruling the motion for a new trial. The contract in question embraced the transient as well as the resident paupers; all, in short, that the county were bound to provide for, in said Centre township.

Judgment affirmed, with costs.

64	524
168	544

64	524
171	678

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**PRACTICE.**—*Uncertainty in Pleading.*—*Demurrer.*—*Motion.*—Where a pleading states a sufficient cause of action in a vague or indefinite manner, the defect can be reached, not by demurrer, but only by motion to make more certain and specific.

**COUNTY CORONER.**—*Inquest.*—*Employment of Physician or Surgeon.*—*Liability of County.*—*Residence of Physician.*—The coroner of a county, in hold-

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ing an inquest upon the body of a human being found within his county, and supposed to have come to death by casualty or violence, has the right to employ such medical or surgical skill as in his judgment may be necessary, and to charge his county with the payment of the reasonable value thereof; and, in so doing, he is not limited to the employment of persons residing within the county.

**SAME.—Coroner to Certify, and Commissioners to Order Payment for, Services.**—Where such services have been rendered at the request of the coroner, it is his duty to certify the facts to the board of commissioners, whose duty it is to order payment therefor, at their reasonable value, out of the county treasury.

**SAME.—Value of Services.—Coroner's Contract.—Measure of Damages.**—The fact that the coroner, in requesting such services, stipulates the amount to be paid therefor, is not binding, as the value of the services must be determined as in any other unliquidated claim against the county.

**SAME.—Appeal, or Original Action, on Disallowance.—Board's Decision not Final.—Former Adjudication.**—Upon the total disallowance of such a claim, by the board of commissioners, the claimant may, at his option, either appeal, or bring an original suit for the value of his services; and such disallowance will not support or authorize a plea of former adjudication, as the determination of such claim by the board is not final.

**SAME.—Constitutional Law.—Title of Act.**—The subject-matter of section 10 of the act authorizing and limiting allowances, 1 R. S. 1876, p. 63, is properly embraced within the title of that act.

**SAME.—Chemical Analysis Outside of County.**—The fact that the claimant, at the request of the coroner, after a *post mortem* examination of the body of a deceased person, supposed to have died by poison, took the stomach out of the county to make a chemical analysis of its contents, is no defence to an action against the county, for such services.

**SAME.—Motive Instigating Inquest.—Notice.**—The fact that such inquest was instigated by a third person, from interested motives, and should not have been held, constitutes no defence to such action, unless it is also alleged that the claimant had notice of such facts, before performing the services.

**SAME.—Person Dying in One, Buried in Another, County.—What Coroner to hold Inquest, after Burial.**—Where, after burial, an inquest becomes necessary to determine the manner of the death of a person who, dying in one, is buried in another, county, the coroner of the latter county is the proper officer to hold the inquest.

**SUPREME COURT.—Practice.—Motion to Strike Out Part of Pleading.—Bill of Exceptions.—Record.**—To present to the Supreme Court any question upon the ruling on a motion to strike out parts of a pleading, both the motion and the ruling must be made part of the record by a bill of exceptions.

From the Bartholomew Circuit Court.

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*J. L. McMaster, A. Boice and C. E. Clark, for appellant.*  
*F. T. Hord, for appellee.*

Howk, C. J.—In this action, the appellant sued the appellee, in a complaint of three paragraphs, upon an open account for services rendered by the appellant as a physician, at the instance and request of the coroner of Bartholomew county. The appellee demurred to each paragraph of the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrers were overruled, and to these decisions the appellee excepted. The appellee then answered, in seven paragraphs; and the appellant demurred to the third, fourth, fifth, sixth and seventh paragraphs of said answer, upon the ground that neither of them stated facts sufficient to constitute a defence to his action. The demurrer was sustained by the court to the sixth and seventh paragraphs of the answer, and to this ruling the appellee excepted; and as to the third, fourth and fifth paragraphs of said answer, the court overruled the demurrer, and to this decision the appellant excepted. The appellant failed and refused to reply to the appellee's answer, and judgment was rendered thereon, on the demurrer thereto, in favor of the appellee and against the appellant, for the costs of suit, from which judgment this appeal is now here prosecuted.

In this court the appellant has assigned, as errors, the decisions of the circuit court in overruling his demurrers to the third, fourth and fifth paragraphs of the appellee's answer; and the appellee has assigned, as cross errors, the decisions of the court below in overruling its demurrers to the several paragraphs of the complaint, and in sustaining the appellant's demurrer to the sixth and seventh paragraphs of its answer.

In the natural order of things, it is proper that we should first consider and pass upon the appellee's cross

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errors, which call in question the sufficiency of the different paragraphs of the appellant's complaint.

In the first paragraph of his complaint, the appellant alleged, in substance, that said Bartholomew county was indebted to him in the sum of five hundred dollars, for work and labor done and performed, and professional services rendered, by the appellant for said county, at its special instance and request, a bill of particulars of which was filed with and made part of said paragraph; that said sum of money was then long past due; and that the appellee, though often requested, had failed and refused to pay said indebtedness, and the same was then due and wholly unpaid.

The bill of particulars, which was filed with and made part of each of the paragraphs of the appellant's complaint, was as follows:

"Bartholomew County, Indiana,

"To Henry Jameson, M. D., Dr.

"Nov. 28th, 1876. To analysis of stomach of Mary Prather, by request of Coroner of Bartholomew County,.... \$500.00."

With the complaint, there was also filed a copy of a written order, signed by the coroner of Bartholomew county, which was made a part of the second paragraph of the complaint, but we may properly set it out in this connection, as follows:

"INDIANAPOLIS, Nov. 6th, 1876.

"Dr. Henry Jameson will make a careful analysis of the stomach of Mary Prather, deceased, submitted by me this 6th day of November, 1876. This analysis to be made with a view of determining the presence of any poison that may have been introduced before death, and the report of the same to be submitted to S. A. Bayless, Coroner of Bartholomew county, Ind. The compensation for said service, including service at court if this case is in litigation, shall be one hundred and fifty dollars (\$150.00), to be paid by

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the commissioners of Bartholomew county, Indiana, upon my certificate, when the service shall be completed, or as soon thereafter as the county board shall convene.

(Signed),

“ S. A. BAYLESS,

“ Coroner of Bartholomew Co., State of Indiana.”

The allegations of the first paragraph of the complaint are not very full, explicit or satisfactory, but they state the appellee's indebtedness, in general terms, to the appellant, and this statement is admitted by the demurrer. If the appellee wanted a fuller and more explicit statement of the grounds of the appellant's cause of action, its remedy was, not a demurrer for the want of sufficient facts, but a motion to make more specific and certain the allegations of the first paragraph of the complaint. *The Pennsylvania Company v. Sedwick*, 59 Ind. 336. The court did not err, we think, in overruling the appellee's demurrer to the first paragraph of the complaint.

The appellant alleged, in substance, in the second paragraph of his complaint, that, on the 6th day of November, 1876, S. A. Bayless, then the coroner of Bartholomew county, Indiana, employed the appellant to analyze the stomach of Mary Prather, deceased, for the detection of poison therein, and report the result of said analysis to him, the said Bayless; that said Bayless further agreed, that the county commissioners of said county should compensate the appellant in the sum of \$150 for his services in making such analysis, when the services should be completed and certified to by said coroner; that said employment by said coroner, and his agreement for said county in that behalf, were reduced to writing, and a copy of such writing was filed with and made part of said paragraph; that the appellant made the analysis of said stomach and his report thereof to said coroner, during November, 1876, and fully performed each and every thing he was employed to perform by said coroner; that, after the rendition of said ser-

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vices, the appellant's account therefor in due form, properly verified by him and certified to as correct by said coroner, was filed by the appellant before the board of commissioners of said county, on the — day of —, 187—, and payment thereof demanded; that the appellee, unmindful of its duty in the premises, failed and refused either to allow or pay said sum of money, or any part thereof, and the same was due and wholly unpaid; that the services so rendered by the appellant, which were necessary in making said analysis a complete and proper one, were worth much more than the sum of \$150; that the said Mary Prather was a deceased person, whose body was found within said Bartholomew county, and on whose body a *post mortem* examination and inquest were held by said coroner, in the discharge of his official duty, it being supposed that the said Mary Prather had come to her death by casualty or violence, and said analysis, so made by the appellant, was necessary to determine whether or not her death ensued, in fact, because of casualty or violence.

The question of the sufficiency of this second paragraph of the complaint depends for its proper determination upon the construction to be given to the provisions of the statute, entitled "An act prescribing the powers and duties of coroners," approved May 27th, 1852, as amended by an act approved February 9th, 1871. In the 4th section of this statute, it is made the duty of every coroner, "as soon as he shall be notified that the dead body of any person, supposed to have come to his death by violence or casualty, is within his county," to issue his warrant to a constable of the township where the dead body is lying, requiring him to summon a jury of six men of said township, to appear before such coroner and enquire, upon view of the body, how and in what manner and by whom he came to his death. 2 R. S. 1876, p. 20.

Section 6 of said act prescribes the form of the oath to  
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be administered by the coroner to the jury, and section 7 declares, that, "The jurors being sworn, the coroner shall give them a charge upon their oaths, to declare of the death of the person, how and by whom it was caused, and all circumstances attending the same, and whether any person is guilty of said death, and the degree of guilt."

In section 8 of said act, it is provided as follows :

"Sec. 8. All persons desirous of being heard, shall be examined as witnesses, and the coroner may cause witnesses to be summoned by subpoena, issued by him, and served by a constable; who shall answer all questions asked them on oath, touching such death. And when a surgeon or physician is required to attend such inquest and make a *post mortem* examination, the coroner shall certify such service to the board of county commissioners, who shall order the same paid out of the county treasury." 2 R. S. 1876, p. 21.

It is very clear, we think, that it was the intent and purpose of these statutory provisions, to clothe the coroner of the county, whenever he should be notified that the dead body of any person, supposed to have come to his death by violence or casualty, was within his county, with the necessary power to properly enquire, and if possible ascertain, how, in what manner, and by whom such person came to his death, and whether any one was guilty of said death, and the degree of guilt. The welfare of society and the interests of public justice alike demand, that such an enquiry or inquest should be thorough and complete, to the end, that, if the death has been caused by a criminal agency, the guilty may be discovered, and receive merited punishment, and the innocent may, perhaps, be freed from unjust suspicion. We think, therefore, that these statutory provisions should be liberally construed, with a view to the accomplishment of the end desired, and in such manner as to enable the coroner, where the death of a human

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being has apparently been caused by criminal agency, to employ such scientific means, and persons skilled therein, as may be necessary to ascertain the cause of such death. It is well known, that, where the death has been caused by the use of poison, the presence and character of the poison used can be ascertained by a chemical analysis of the contents of the stomach of the dead body, when all other means to that end would probably fail. This being so, and keeping in view the ends to be accomplished by the proper exercise by the coroner of the powers necessarily incident to the discharge of the duties imposed on him by law, namely, the ascertainment of the cause, the manner and the agency by means of which such violent or casual death has ensued, and the degree of guilt attributable to such agency, it seems to us, that the statutory provisions above cited and quoted ought to be so construed, in the interest of justice and humanity, as that the coroner may be thereby authorized to employ such medical or surgical skill as may be necessary, in his judgment, in the particular case, and to charge his county with the payment of the reasonable expense thereof.

Under the facts stated in the second paragraph of the complaint, we are clearly of the opinion that the coroner of Bartholomew county was authorized by the provisions of the statute to employ the appellant, as a physician or surgeon, to make an analysis of the stomach of Mary Prather, deceased, who was supposed to have come to her death by casualty or violence, whose dead body was within said county, for the purpose of determining the presence of any poison in her stomach, which might have been introduced before her death. As the supposition was that the death was caused by poison, it may be regarded as certain, that, without such an analysis of the contents of the stomach of the decedent, the *post mortem* examination and inquest held by the coroner, in the discharge of his official duty, would



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have been, at most, an empty and unavailing form. By his employment of the appellant, the coroner secured not only the appellant's analysis of the stomach, but also his personal presence as a witness, whenever it was desired, in Bartholomew county. We do not think that the apparent employment of the appellant by the coroner, outside of his county, materially affects the question now under consideration. The coroner was authorized, and it was his duty, under the law, to employ such medical or surgical skill as would enable him and his jury to determine, if practicable, how, in what manner, and by whom the decedent, Mary Prather, came to her death, and whether any person was guilty of her death, and the degree of guilt. In the employment of such skill for such purpose, we do not think that the coroner was, or ought to have been, limited by the boundaries of his county. In our opinion, the second paragraph of the complaint stated facts sufficient to constitute a cause of action, and the demurrer thereto was correctly overruled.

Of the third paragraph of the appellant's complaint, all that is said by the appellee's counsel, in his brief of this cause, is contained in the following sentence: "The same objections made above to the second paragraph of the complaint apply to this paragraph, and I will not repeat them." Having reached the conclusion that the second paragraph of the complaint was a sufficient cause of action, we need not and do not consider the sufficiency of the third paragraph. We may add here, however, what we ought perhaps to have said while considering the sufficiency of the second paragraph; that is, we do not think that the appellee was bound by the contract of the coroner to the payment of the precise sum mentioned in his employment of the appellant. The coroner was authorized by the statute, as we construe it, to employ the appellant to make the analysis, for the purposes of the inquest; and

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it was the coroner's duty to certify the facts in regard to such service, to the appellee, whose duty it then became to order the payment therefor, of the value thereof, out of the county treasury. The amount of the appellant's compensation for his services was to be determined by the appellee, like any other claim against the county.

Our conclusion is, that no error was committed by the circuit court in overruling the appellee's demurrer to the several paragraphs of the appellant's complaint, or either of them.

We pass now to the consideration of the several questions presented for our decision by the alleged errors of the court below, complained of by the appellant in this court.

The first error assigned by the appellant is the decision of the circuit court in overruling his demurrer to the third paragraph of the appellee's answer. In this third paragraph of its answer, the appellee alleged, in substance, that the coroner of Bartholomew county certified the appellant's said services to the appellee; that the appellant, at the December term, 1876, filed the said claim, so duly certified, before the appellee, in proper form, for allowance, and the same was duly submitted to the appellee for its consideration and allowance; and that, after the proper and due submission of evidence to the appellee, while lawfully in session at its said December term, the same was disallowed by the appellee, of which the appellant had due notice, and judgment was duly entered against the appellant thereon, and no appeal had been taken by the appellant from the action of the appellee; but that the judgment of the appellee remained in full force and unreversed, and that said adjudication was a bar to the appellant's action.

It will be seen, from the allegations of this paragraph of the answer, that the appellee relied therein upon the facts, that the appellant had filed his claim with the appellee for allowance; that, upon a hearing of the claim, the

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appellee, in its lawful and regular session, had rejected and refused to allow the same, and had entered judgment accordingly, of which the appellant had due notice, and that the appellee's judgment and action on said claim had not been appealed from, but remained in full force and unreversed, as an absolute bar to the appellant's action.

In section 10 of "An act to authorize and limit allowances by courts and boards," etc., approved May 27th, 1852, it is provided as follows :

"From all decisions for allowances other than those provided for in the preceding section, an appeal may be taken, within thirty days, to the circuit court, the party giving sufficient bond against costs, payable to such board. And if a claim be disallowed in whole or in part, the claimant may appeal ; or, at his option, bring an action against the county ; but if he shall not recover more on such appeal than is allowed, he shall pay the costs of such appeal." 1 R. S. 1876, p. 63.

It seems to us, that the appellant's action comes fairly within the provisions of said section 10, and that, as his claim was wholly disallowed, he had the option either to appeal from the decision, or to "bring an action against the county," the appellee, for the amount of his claim. This is in accordance with the construction heretofore given, by many decisions of this court, to the section cited of the statute. *The Board, etc., of Bartholomew County v. Wright*, 22 Ind. 187; *The Board, etc., of Bartholomew County v. Ford*, 27 Ind. 17; *The Board, etc., of Bartholomew County v. Boynton*, 27 Ind. 19; *The Commissioners of Morgan County v. Holman*, 34 Ind. 256; *The Board, etc., of Warren County v. Gregory*, 42 Ind. 32; and *Conner v. The Board, etc., of Franklin County*, 57 Ind. 15. Section 8, above quoted, of the statute prescribing the powers and duties of coroners, as we have construed it, authorized the employment of the appellant by the coroner of Bartholomew county, and ren-

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dered the appellee liable for the reasonable value of the appellant's services. The appellee claims, that it alone was authorized to determine whether or not it would pay the appellant's claim for his services, and that its decision of the question was final. We fail to see the matter in this light. It seems to us, that the coroner of the county, in the discharge of his official duties, was authorized by law to employ the appellant to make the necessary analysis, and to render his county liable to the appellant for the reasonable value of his services ; and that the appellee can not escape such liability, by its mere refusal to allow the appellant's claim, even though such refusal should be in the form of a judgment.

It is said by the appellee's counsel, that section 10 of the act authorizing and limiting allowances, etc., above quoted, in so far as it authorizes a claimant, whose claim has been disallowed by the county board, to bring an action therefor against the county, is unconstitutional, because the provision is not properly connected with the subject-matter of the act, as expressed in its title. We do not think that the section, or any of its provisions, is so clearly in conflict with the requirements of the constitution, in this regard, as to authorize us to hold it unconstitutional and void. Indeed, it seems to us that the provision of section 10, objected to by appellee as unconstitutional, is very fairly and properly connected with the subject of the act, as the same is expressed in its title. Our conclusion is, that the court erred in overruling the appellant's demurrer to the third paragraph of the appellee's answer.

The second error assigned by the appellant is the decision of the court below in overruling his demurrer to the fourth paragraph of the appellee's answer. This fourth paragraph of answer was as follows :

"4th. The defendant, for further answer herein, says, that the said inquest was held by the said coroner in Bartholo-

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mew county, Indiana, as averred in the complaint; but the defendant avers that the plaintiff did not attend the same, and was not present thereat, and never held or performed any *post mortem* examination over the body of said deceased; that, after a *post mortem* examination had been made of the body of said deceased, during which the stomach of said deceased was removed from her body, the said coroner, without authority of law, carried said stomach to the city of Indianapolis, in Marion county, Indiana, to the plaintiff, to be analyzed by him, and the same was analyzed by plaintiff at the said place of his residence, a distance of fifty-five miles from the place of said inquest, and said analysis is the only service rendered by the plaintiff, for which he is not authorized to recover."

We are clearly of the opinion that the facts alleged in this paragraph of answer were not a sufficient defence to the appellant's action. In the exercise of his official power and duty, the coroner of Bartholomew county had made a *post mortem* examination of the body of the decedent, and had removed therefrom the stomach of the deceased. It was suspected that the decedent had come to her death by means of poison, criminally administered to her by some one before her death. This fact, if it were the fact, it was the duty of the coroner to ascertain, if practicable; and it could only be ascertained with certainty by a chemical analysis of the stomach of the decedent. In the discharge of his duty the coroner was authorized by the statute, as we construe it, to employ such medical or surgical skill as might be necessary to enable him and his jury to arrive at the truth, in regard to the cause of the decedent's death, and to charge his county with the payment of the reasonable expense thereof. In the selection and employment of such necessary skill, as we have already said, we do not think that the coroner was necessarily confined to or by the territorial limits of Bartholomew county. He was

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authorized, we think, in the discharge of his official duties, if he deemed it advisable, in the exercise of his discretion, to employ a physician at, and residing in, the City of Indianapolis, to make the necessary chemical analysis of the decedent's stomach; and, the appellant having been employed as such physician, it was certainly not unlawful, in our opinion, for the coroner to deliver the decedent's stomach to the appellant, at his laboratory in the City of Indianapolis, or in the analysis there of such stomach. The court clearly erred, we think, in overruling the appellant's demurrer to the fourth paragraph of the appellee's answer.

The court also overruled the appellant's demurrer to the fifth paragraph of the appellee's answer; and this decision is the third error assigned by the appellant, in this court. We set out this fifth paragraph, as follows:

"The defendant, for further answer herein, says, that the coroner of Bartholomew county, Indiana, held the inquest over the dead body of Mary Prather, as averred in the complaint; that the plaintiff did not attend said inquest, and did not hold a *post mortem* examination over the body of said deceased; that plaintiff was at said time a resident of the city of Indianapolis, in Marion county, Indiana, and was then in said Marion county, and not at any time within Bartholomew county; that plaintiff was then and at all times beyond the reach of any process that said coroner might lawfully issue, and no process was in fact at any time issued by said coroner against said plaintiff, requiring him to appear and render any service in said *post mortem* examination; that the only service rendered by the said plaintiff was the analysis of the stomach of said deceased, at the county of Marion, after the same had been removed from the body of deceased in a *post mortem* examination held by other and different persons, who were competent therefor, viz., Samuel M. Linton, and the same was trans-

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ferred to plaintiff by said coroner in said Marion county. The said service was not compulsory, but the same was voluntary, though at the request of said coroner, for which no action can be sustained, and the disallowance thereof by the defendant was final."

From what we have already said in considering the sufficiency of the other paragraphs of the appellee's answer, it follows clearly, as it seems to us, that the facts stated in this fifth paragraph must be held insufficient to constitute a defence to the appellant's action. The only additional fact, alleged in this fifth paragraph, which was not stated substantially in the fourth paragraph of the answer, is the fact that there were competent persons to make the analysis of the decedent's stomach, in Bartholomew county, at the time the stomach was transferred by the coroner to the appellant, in Marion county. It seems to us, that this was an immaterial fact, which can not affect the appellee's liability to the appellant, for the reasonable value of his services in the premises. In the determination of the facts in relation to the death of the decedent, which facts the law made it the duty of the coroner to ascertain, if possible, he was authorized, we think, in the exercise of his discretion, to secure and employ such medical or surgical assistance as he might deem necessary to the ascertainment of such facts; and in the discharge of this duty, and in securing and employing such assistance, we do not think that he can or ought to be restricted or confined to the limits of his county. In our view of the matter, the court erred in overruling the appellant's demurrer to the fifth paragraph of the answer.

The fourth alleged error, complained of by the appellant, is the decision of the circuit court in sustaining the appellee's motion to strike out a part of the second paragraph of the complaint. Neither the motion nor the decision of the court thereon were made parts of the record

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of this cause, by a proper bill of exceptions. This fourth error, therefore, is not found in the record, and presents no question for our decision.

The appellee has assigned one other cross error, complaining of the decision of the circuit court in sustaining the appellant's demurrer to the sixth paragraph of answer. This sixth paragraph reads as follows :

"The defendant, for further answer herein, says, that the said Mary Prather, on whose dead body said inquest was held, was at the time of her death, and for a long time prior thereto, a resident of Jackson county, in the State of Indiana; that she died in said Jackson county, at her home and residence therein, and was buried in Bartholomew county, Indiana, just over the county line; that she at no time resided in said Bartholomew county, Indiana, but lived at all times, contracted her sickness, and died in said Jackson county, of all of which said coroner well knew; that, if she died from any crime perpetrated, such crime was done and accomplished in said Jackson county, of which said coroner well knew; that she did not die within Bartholomew county, or of any crime committed therein; that said coroner's inquest was instigated by the Michigan Mutual Life Insurance Company, a foreign corporation, resident of the State of Michigan, for its own private convenience and benefit, inasmuch as the life of said Mary Prather was insured in said company, and it was seeking for its own purposes to learn and ascertain some pretext on which to avoid the payment of said insurance policy, of which said coroner well knew; that said coroner of Bartholomew county had no authority to hold said inquest or to charge the expense thereof to defendant."

It is certain, we think, that the facts stated in this sixth paragraph of the answer were not sufficient to constitute a defence to the action. It is true that the duties of a coro-



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ner, under the statute, are clearly limited thereby to the investigation of the causes of sudden or violent death, and the ascertainment, if possible, of the manner of such death, who, if any one, was guilty thereof, and the degree of guilt. These are the public duties of the coroner, which he is bound under the law to discharge, without fear or favor, in the interests of humanity and public justice. Private malice or private gain should never influence or actuate the coroner in the discharge of his high public duties; and the presumption is, and must be until the contrary has been made to appear, that duty alone, and neither malice nor gain, has prompted or instigated the coroner in making his public inquest into the manner and cause of sudden or violent death, who is guilty thereof, and the degree of guilt. The public at large, and the individual citizen, have the right, we think, to rely implicitly on this presumption, in dealing with the coroner in any matter connected with the proper discharge of his official duties. It can not be assumed that a coroner, in making a public inquest under the requirements of law, is influenced therein by improper motives, or actuated thereto by malice or revenge, or by any desire of gain. If, in this case, the inquest held by the coroner of Bartholomew county, over the remains of Mary Prather, was prompted by sinister motives, or was not held in the interests of humanity and public justice, or was, from any cause not clearly apparent on its face, an illegal or unauthorized inquest, it seems clear to us that these facts would not constitute a valid defence to the appellant's action, without an allegation that the appellant, at the time of his employment and the rendition of his services, had actual notice or knowledge of the existence of such facts. For the want of such an allegation therein, we are of the opinion that the court did not err in sustaining the appellant's demurrer to the sixth paragraph of the appellee's answer. We may properly add, in this connec-

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tion, that, under the facts alleged in this sixth paragraph of answer, we think that the coroner of Bartholomew county was the proper coroner, under the statute, to hold an inquest on the body of Mary Prather, deceased, at the time such inquest appears to have been held.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the appellant's demurrer to the third, fourth and fifth paragraphs of answer, and for further proceedings in accordance with this opinion.

Petition for a rehearing overruled.

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ALEXANDER, ADMINISTRATRIX, v. ALEXANDER.

**DECEDENTS' ESTATES.—Claim on Promissory Note.—Answer of Failure to Collect Judgment Assigned as Collateral.—Negligence.—Notice.**—In an action by the payee, against the administrator of the estate of the deceased maker, on a promissory note, the defendant answered, alleging that the decedent, on executing the note in suit, had assigned to the payee, as collateral security, a judgment in favor of the decedent, against another, amounting to a sum more than sufficient to satisfy the note in suit; that such judgment was a lien, and also secured by a mortgage, upon real property belonging to the judgment debtor, of a value sufficient to satisfy such judgment; that the judgment debtor was also the owner of personal property, subject to execution, of a value sufficient to satisfy such judgment; that, though the payee still held the judgment as collateral, and though the amount thereof could have been made on execution, as the payee well knew, the latter had negligently failed to issue execution thereon; and that, if the note in suit be put in judgment, the personal property of the decedent's estate, which was amply sufficient for the payment of all other debts, would be insufficient, and real estate would have to be sold, to pay off the note in suit.

*Held*, on demurrer, that, on behalf of an estate, the answer is sufficient.

From the Floyd Circuit Court.

*D. W. LaFollette, W. W. Tuley, A. C. Voris, M. F. Dunn*  
and *F. Wilson*, for appellant.

*A. Dowling*, for appellee.

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Alexander, Administratrix, v. Alexander.

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WORDEN, J.—The appellee filed her claim against the estate of Thomas M. Alexander, consisting of three promissory notes executed by said Thomas M. to said Martha A., each for the sum of one thousand seven hundred and seven dollars and thirty-three cents, dated March 4th, 1871, and payable, respectively, in one, two and three years from date, with interest at the rate of ten per cent. per annum.

The claim was filed in the court of common pleas, but the cause was transferred to the circuit court, upon the dissolution of the court of common pleas. In the circuit court such proceedings were had as that judgment was rendered for the plaintiff in the sum of four thousand four hundred and thirty-one dollars and fifteen cents. That judgment was reversed by this court, and the cause remanded for further proceedings. See *Alexander v. Alexander*, 48 Ind. 559.

After the cause went back from this court, the appellee filed her demurrer, for want of sufficient facts, to the fourth paragraph of the defendant's answer, which was sustained, and exception taken.

Such further proceedings were had as that the plaintiff had judgment of allowance for two thousand nine hundred and thirty-two dollars.

But one question is now here raised, viz., did the court below err in sustaining the demurrer to the fourth paragraph of answer?

The paragraph of answer in question alleged, in substance, that, at the time of executing the notes, the deceased transferred and assigned to the plaintiff a judgment rendered in the Floyd Circuit Court, on October 28th, 1870, for five thousand and nineteen dollars and fourteen cents, in favor of Martha A. Alexander, against John Gordon, of which judgment the said Thomas M. Alexander was then the owner, which judgment was assigned to the plaintiff

as a collateral security for the payment of the notes mentioned; that, at the time the judgment was assigned, it was secured by a mortgage upon a large amount of land in the counties of Stark and Newton, in the State of Indiana, of the value of ten thousand dollars. The judgment was also a lien upon a large amount of real estate in the county of Floyd, of the value of twenty thousand dollars, the property of said Gordon; that, at the time of the assignment of the judgment, Gordon was the owner of personal property more than sufficient to pay the judgment, interest and costs, and still is the owner thereof; that the plaintiff had full knowledge of all the facts herein set forth, respecting the judgment, mortgage, and the personal and real property of said Gordon; that the plaintiff placed the judgment in the hands of Alexander Dowling, her attorney, who had full knowledge of said facts; that the judgment thus assigned as collateral security remains uncollected by means of the plaintiff's negligence; that the plaintiff has not used reasonable nor ordinary diligence in the collection thereof, in this, that she has neither foreclosed the mortgage nor had an execution levied upon any of the real or personal property of Gordon; that the personal estate of the deceased amounts to about five thousand dollars, exclusive of the judgment against Gordon, and that, deducting therefrom the amount allowed the widow, and the other debts and expenses of administration, there would not remain enough to pay the claim of the plaintiff without proceeding to sell the real estate of the deceased, which would be injurious to the interests of the estate, and unnecessary if the plaintiff would proceed to collect the judgment; that the amount due on the judgment is more than enough to pay the amount due on the notes, and that the judgment could have been, and, but for the negligence of the plaintiff, would have been, collected. Wherefore, etc.

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Alexander, Administratrix, v. Alexander.

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It may be conceded, that the matter set up in the answer would not make the appellee responsible, as for the value of the judgment; and yet it does not follow, that the answer was not good. If the action had been against the deceased in his lifetime, upon the notes, the matter set up in the answer would probably have been no bar to the action, because nothing appears to have been lost by the plaintiff's failure to collect the collateral.

But, according to the answer, the collateral is good, and can be collected, and is more than sufficient to pay the plaintiff's claim against the estate, and the plaintiff still holds it; there is not enough personal property belonging to the estate, other than the judgment thus held by the plaintiff as a collateral, after deducting the amount to which the widow is entitled, and other debts and expenses, to pay the plaintiff's claim; and, if allowed, real estate will have to be sold to pay it.

The personal property of an estate is the primary fund out of which debts not secured by a specific lien on real estate are to be paid. An administrator can not proceed to sell real estate for the payment of debts, until he shall have discovered that the personal is insufficient. If the judgment in question were restored to the administratrix, she could not proceed to sell real estate to pay the plaintiff's claim, until she had taken steps to collect the judgment; and its collection would render it unnecessary to sell real estate. But the plaintiff holds the judgment as collateral security for the payment of her claim. She holds the primary fund out of which her claim ought to be paid, before resorting to the realty. She neither collects the judgment nor restores it to the administratrix, whereby the latter might collect it and pay her claim.

We think, that, in equity, she ought to be required to proceed on the collateral, and collect her claim, or so much thereof as she may be able to, before asking

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Dailey v. Coons.

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an allowance of it against the estate, whereby real estate would have to be sold to pay it. If the administratrix were to sell realty to pay the claim, and were thereby to pay it, the judgment would revert to her, or perhaps to the heir whose land had been sold, and she would then have in her hands personalty, which should have been applied to the payment of the debt, instead of the realty sold for that purpose. The plaintiff has the primary fund in her hands, out of which her claim ought to be paid, and she ought to exhaust that fund before proceeding against the estate, whereby the secondary fund, the realty, would have to be applied to that purpose.

We think the paragraph of answer was good, and that the demurrer to it should have been overruled.

But the appellee claims, that there was another, the sixth, paragraph, under which the matters alleged in the fourth could have been given in evidence. The sixth paragraph was a counter-claim, setting up some of the matters alleged in the fourth, and some not contained in it; but it was entirely silent in respect to the facts on which we hold the fourth good, and those facts could not have been given in evidence under it.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

NOTE.—Howk, C. J., having been of counsel in the cause, did not participate in this decision.

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DAILEY v. COONS.

**PARTNERSHIP.**—*Implied from Acts or Declarations.*—*Contract.*—One who, by his acts or declarations, creates in the mind of another a reasonable be-  
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lief that he and a third person are copartners in a particular business, is liable to the person so believing, on a *bona fide* contract made by the latter with such supposed copartner, as such, in the regular course of such business, although in fact no such partnership existed.

**EVIDENCE.**—*Proposition to Pay, to Avoid Lawsuit.*—A proposition to pay money, made by a party expressly to avoid a lawsuit, is not competent evidence against him in an action on the same demand.

From the Adams Circuit Court.

*D. Studebaker and J. P. Quinn*, for appellant.

BIDDLE, J.—This suit was commenced before a justice of the peace, by the appellee, against the appellant and Jesse Hartzog, as partners under the firm name of “Hartzog & Dailey.”

Hartzog was not served before the justice. Service was had on Dailey, who made default, and the justice rendered judgment against him, with costs.

A new trial was granted, and Hartzog appeared to the action. Upon a second trial, the justice found against Hartzog and in favor of Dailey, and rendered judgment accordingly. From this judgment an appeal was taken to the circuit court, wherein a jury trial was had, and a verdict returned against Dailey.

Motion for a new trial; overruled; exceptions; judgment; appeal.

The cause of action is the alleged sale and delivery of two hogs, by the appellee, to the firm of Hartzog & Dailey, who are averred to be partners; and the main contest in the evidence was to prove the partnership as alleged.

One of the causes assigned for a new trial is, that the court erred in giving the following instruction to the jury:

“2. If you believe from the evidence, that said Hartzog and Dailey entered into a copartnership, for the purpose of buying and dealing in hogs, that, at the time it is alleged said hogs were sold, they were in such partnership, engaged

in buying and dealing in hogs, that the plaintiff sold said hogs to said Hartzog and Dailey as copartners, that said Hartzog, at the time he received the hogs, if he did receive and purchase the same, was acting, not in his individual capacity simply, nor for Hartzog & Bro., but for the firm of Hartzog & Dailey, or if you believe, from the evidence, that Hartzog and Dailey did not formally enter into such copartnership for the purpose aforesaid, but that said Dailey so acted as to lead the plaintiff reasonably to believe that he was a member of said firm, as that he allowed his name to be used in connection with that of Hartzog in the business of buying hogs, or in permitting the firm name of Hartzog & Dailey to be signed to any paper, or writing, connected with said business, or if, by any declaration or indication on the part of said Dailey, in the presence or hearing of the plaintiff, the plaintiff reasonably believed that said Dailey was a member of said firm of Hartzog & Dailey, and that he sold and delivered his hogs to Hartzog & Dailey, the said Dailey not being personally present when the hogs were sold and delivered, believing, at the time that he sold and delivered said hogs, that said Dailey was a member of said firm, engaged in the business of buying hogs, then you may find for the plaintiff."

A majority of the court hold this instruction to be proper.

At the trial in the circuit court the appellee was a witness. During his testimony in chief, he stated: "I stopped on my way to Decatur at Dailey's house, and had a conversation with him about the case, and offered to throw off the five dollars and the odd cents, and he refused, and offered to pay half the claim, which I declined." Here the defendant Dailey objected to the evidence of the witness, on the ground that it was a statement of an offer and proposition of settlement, and, as such, not evidence against the defendant, which objection was by the court overruled, to



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which ruling of the court the defendant excepted at the time, and the witness was permitted to testify, and said: "Dailey said rather than to have a lawsuit and hard feelings among neighbors, he would pay one-half of my claim. I gave him to understand that I would go to Decatur, and determine whether I would accept the offer, or sue." Whereupon the defendant Dailey moved to strike out the evidence objected to, on the ground that it proved offers and propositions only of settlement, but the court overruled the objection, to which ruling of the court the defendant at the time excepted, and permitted the evidence to remain with the jury.

In the case of *Cates v. Kellogg*, 9 Ind. 506, this court says: "The law is well settled, that a party 'may buy his peace.' If he had rather pay something than experience the trouble of a lawsuit, or take its hazards, he may offer to do so; but such offer shall not be evidence against him, if the attempted compromise fails, in a subsequent suit, upon the subject-matter of the abortive adjustment, if he objects to its admission as such."

It seems to us that the case we are considering falls strictly within the rule announced in the case of *Cates v. Kellogg*, just cited, and that the court erred in admitting the testimony of Coons touching the offer of compromise, to which the appellant objected.

For this error the judgment is reversed, at the costs of the appellant; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

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64	548
184	219
64	548
153	203

## THE SINGER MANUFACTURING COMPANY v. BROWN ET AL.

FOREIGN CORPORATIONS AND THEIR AGENTS.—*Promissory Note.*—*Abatement of Action.*—*Pleading.*—*Contract.*—In an action by a foreign corpo-

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ration, as payee, against the maker, on a promissory note executed pursuant to a contract entered into, in this State, between the defendant and an agent of the payee, as such, the defendant answered, alleging, in effect, that, *at* and *prior* to the execution of the note, such agent had failed to comply with the requirements of sections 1 and 2 of the "act respecting foreign corporations and their agents in this State." 1 R. S. 1876, p. 378. *Held*, on demurrer, that, for want of an allegation that the requirements of such sections had not been complied with *at* or *prior* to the commencement of the action, the answer is insufficient. *Held*, also, that the effect of such non-compliance is, not to render the contract void, but to prevent its enforcement until compliance.

From the Clay Circuit Court.

*J. McAnnely*, — *Julian, C. W. Smith, R. O. Hawkins* and *C. H. Remy*, for appellant.

Howk, C. J.—This was a suit by the appellant, as the payee, against the appellees, as the makers, of a promissory note, dated June 28th, 1873, and payable twelve months after the date thereof.

The appellees answered in a single paragraph, to which the appellant demurred, for the alleged insufficiency of the facts therein to constitute a defence to the action, which demurrer was overruled by the court, and to this ruling the appellant excepted.

The appellant then replied specially, in two paragraphs, to the appellees' answer; to which reply the appellees demurred, upon the ground that it did not state facts sufficient to constitute a reply to their answer. This demurrer was sustained by the court, and to this decision the appellant excepted. The appellant failing to reply further, judgment was rendered on said demurrer, in favor of the appellees and against the appellant, for the costs of this action.

In this court the appellant has assigned, as errors, the following decisions of the circuit court:

1. In overruling its demurrer to the appellees' answer;
2. In sustaining the appellees' demurrer to the first paragraph of the appellant's reply; and,

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3. In sustaining the appellees' demurrer to the second paragraph of said reply.

We will consider and decide the several questions arising under these alleged errors, in the order of their assignment.

In their answer to the complaint, the appellees admitted the execution of the note in suit, but they alleged, in substance, that the appellant was a corporation, not organized nor incorporated under the laws of this State, but was organized or incorporated under the laws of the State of New York; that the appellant's agent, employed by the appellant and doing its general business in Clay county, Indiana, at the time the note sued upon was executed, and with whom the appellees contracted, had wholly failed, prior to and at the time of the execution of said note, to deposit in the clerk's office of said Clay county the power of attorney, commission, appointment or other sufficient authority, under or by virtue of which said agent acted as such; nor had such agent, prior to and at the time of the execution of said note, filed with the clerk of the circuit court of said Clay county any duly authenticated order, resolution or other sufficient authority of the board of directors or managers of the appellant, authorizing citizens or residents of this State, having a claim or demand against the appellant, arising out of any transaction in respect to the same, in this State, with such agent, to sue for and maintain an action in respect to the same, in any court of this State of competent jurisdiction; and that, at no time prior to or at the time of the execution of the note in suit, had said agent filed a duly authenticated order, resolution, or other sufficient authority of the board of directors or managers of the appellant, authorizing service of process in such action, on said agent, to be valid service on the appellant, and that such service should authorize judgment and all other proceedings against the appellant;

that the appellees executed said note directly to said agent, and made and entered into said contract with said agent, at a time when the said agent was in the full employment of the appellant. Wherefore the appellees asked judgment for their costs, etc.

It will be readily seen, from the allegations of this answer, that it was the intention of the appellees to plead therein the non-compliance by the appellant's agent with the requirements of sections 1 and 2 of "An act respecting foreign corporations and their agents in this State," approved June 17th, 1852, as an absolute bar to the appellant's action. 1 R. S. 1876, p. 373. The theory of the answer evidently is, that inasmuch as the appellant's agent at Clay county, with whom and where the appellees had executed the note in suit, had not, prior to and at the time of the execution of said note, complied with the requirements of said sections 1 and 2 of the above entitled act, in relation to the agents of foreign corporations doing business theretor in this State, and inasmuch as the appellant was a foreign corporation within the purview and meaning of said act, therefore the note sued on was absolutely void, and did not constitute a cause of action in favor of the appellant. The conclusion does not follow the premises, as the statute is now construed by this court. In section 4 of said act, it is provided, that "Such foreign corporations shall not enforce in any courts of this State, any contract made by their agents or persons assuming to act as their agents, before a compliance by such agents, or persons acting as such, with the provisions of sections 1 and 2 of this act." 1 R. S. 1876, *supra*.

In construing this section 4, and its bearing upon said sections 1 and 2 of the above entitled act, it was held by this court, in the case of *The Walter A. Wood Mowing, etc., Co. v. Caldwell*, 54 Ind. 270, that a note similar to the one now in suit, and executed under similar circumstances,

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was not void by reason of the fact that the agent of a foreign corporation had not, before and at the time of the execution of such note, complied with the requirements of said sections 1 and 2, but that, under said section 4, the foreign corporation could not, in such a case, enforce the collection of the note, before or until such agent had complied with said sections 1 and 2, in any courts of this State. "If suit be instituted on any such contract, and an answer be filed of non-compliance with the statute, such answer will show that the suit is prematurely brought; and if well pleaded and true, will operate to abate the suit." To the same effect is the more recent case of *Daly v. The National Life Ins. Co., etc., ante*, p. 1.

It will be observed, however, in the case at bar, that the appellees have very carefully limited the averments of their answer, in relation to the alleged non-compliance of the appellant's agent, at Clay county, with the requirements of said sections 1 and 2 of the above entitled act, to the time before and the time of the execution of the note in suit. The answer contains no averment that the appellant's said agent had not, at any time since the execution of said note, complied with the provisions of said sections 1 and 2; and, for the want of such an averment, it seems to us that the answer did not state facts sufficient to constitute a defence to the action. As we have seen, the matters stated in the answer could only be pleaded for the purpose of showing that the action had been prematurely brought. The note sued on was dated on the 28th day of June, 1873, and, at that time, it was alleged in the answer that the appellant's agent at Clay county, with whom the contract was made upon which the note was executed, had not complied with the requirements of said sections 1 and 2 of the foreign corporations act. It appears from the record now before us, that this action was commenced in the circuit court, on the 10th day of February, 1875. It does not follow, we think, as a conclusion either of law or of fact,

that, because the appellant's said agent had not complied with the requirements of the statute, at the date of the note, June 28th, 1873, as alleged in the answer, therefore the said agent had not complied with such requirements, on the 10th day of February, 1875, at the time of the commencement of this suit. In our opinion, the court below erred in overruling the appellant's demurrer to the appellees' answer.

The conclusion we have reached, in regard to the insufficiency of the answer, makes it unnecessary for us to consider either of the other alleged errors. We may remark, however, that, while it is admitted in the first paragraph of the reply, that the appellant's agent at Clay county had not, before and at the time of the execution of the note in suit, complied with the requirements of said sections 1 and 2 of said foreign corporations act, yet it is also alleged therein, with clearness and precision, that in 1874, and some time before the commencement of this suit, the appellant's said agent had complied, fully and in detail, with all the provisions of said sections. The appellees' answer failed to show, as we have seen, that this suit was brought prematurely; and the first paragraph of the reply showed affirmatively and clearly, that the action was not commenced until after the appellant's said agent had fully complied with all the provisions of the statute.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to sustain the appellant's demurrer to the appellees' answer, and for further proceedings in accordance with this opinion.

WILLIAMS v. THE STATE.

CRIMINAL LAW.—*Words and Phrases.*—*Public Place.*—The words "on a public highway" are not equivalent to the words "in any public place," used in section 22, 2 R. S. 1876, p. 466, of the act defining misdemeanors.

64	553
126	408
64	553
135	530
64	553
147	497

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Williams v. The State.

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**SAME.—Notorious Lewdness.—Indictment.**—An indictment charging acts constituting “notorious lewdness,” as committed “on a public highway,” and in the presence of divers persons named, is insufficient.

**SAME.—Judicial Notice.—Construction of Statute.**—The history of this State, its topography and condition, enter into the construction of its statutes, and are judicially noticed by its courts.

From the Gibson Circuit Court.

*H. A. Yeager*, for appellant.

*T. W. Woollen*, Attorney General, and *W. H. Trippet*, Prosecuting Attorney, for the State.

**BIDDLE, J.**—The appellant was indicted for notorious lewdness, in the following words:

“The grand jurors of Gibson county, in the State of Indiana, good and lawful men, duly and legally empanelled, sworn and charged, in the Gibson Circuit Court of said State, at the August term for the year 1878, to inquire into felonies and certain misdemeanors in and for the body of said county, in the name and by the authority of the State of Indiana, on their oaths do present, that Joseph L. Williams, late of said county, on the 15th day of June, A. D. 1878, at said county and State, was then and there unlawfully guilty of notorious lewdness, by then and there unlawfully, on a public highway, in said county, openly, grossly and notoriously having sexual intercourse with one Cordelia Mistle, a woman. That the said Joseph L. Williams, at the time and place aforesaid, had the sexual intercourse aforesaid, with the said Cordelia Mistle, in the presence of Scott Harvey and William Lindsey, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana.”

The appellant moved to quash the indictment; his motion was overruled, and he excepted. Plea, not guilty; trial and conviction; punishment, fine \$65, and imprisonment three months. By a motion for a new trial, the appellant also questions the sufficiency of the evidence to sustain the verdict.

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The section of the statute upon which the indictment is based reads as follows, and is found in 2 R. S. 1876, p. 466 :

"Sec. 22. Every person who shall be guilty of notorious lewdness, or who shall, in any public place, make any uncovered and indecent exposure of his or their person, upon conviction thereof, shall be fined in any sum not less than ten nor more than one hundred dollars, to which may be added imprisonment for any term not exceeding three months."

The principal objection made to the indictment is, that the words "on a public highway," used therein, are not equivalent to the words "in any public place," as used in the statute.

Long experience has settled the best words to be used in a statute in defining a criminal offence, and it is seldom safe to depart from them in charging an offence in an indictment; yet it is settled law, that, when other words are used which are clearly equivalent, the indictment will not be insufficient for that reason. The question we are considering, therefore, is, are the words used in the indictment, in defining the offence, clearly the equivalent of those used in the statute?

The history of a country, its topography and condition, enter into the construction of the laws which are made to govern it, and we must notice these facts judicially. We must know the fact, that, in the State of Indiana, a public highway some times ceases to be travelled, and is abandoned, long before it ceases to be legally a public highway, and that often portions of a highway are not used as such for so long a time that they cease to be public places; and, indeed, there are occasionally places, owing to their peculiar topography, on public highways constantly used, which become private, and afford even secret places, where the act charged upon the appellant might have been committed wholly away from public gaze or annoyance. Besides, sometimes public highways are laid out and estab-



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lished legally, through portions of primeval forest, and thick underbrush, affording many secret places for "nest-hiding," which remain secure and unbroken, and impenetrable to the public eye, for a long time before such highways are opened practically, and become public places.

The act, to make it criminal, whatever may be its morality, must have been committed in some "public place;" and, unless we can hold, as a safe rule of law to govern all cases, that the words "on a public highway" are generally the equivalent of the words in a "public place," the indictment must be held insufficient.

The section defining an affray, in the same act, 2 R. S. 1876, p. 459, is as follows:

"SEC. 6. If two or more persons by agreement, fight in any public place, the persons so offending, shall be deemed guilty of an affray; be fined not exceeding twenty dollars, or imprisoned not exceeding five days each."

It will be observed that, as to the place in which the act must be committed to make it criminal, the same words are used in defining an affray as those used in defining notorious lewdness. The same construction, then, should be given to the words in both cases.

In the case of *The State v. Weekly*, 29 Ind. 206, which was a prosecution for an affray, it was held that the words "in a certain highway there situate," used in the indictment, were not equivalent to the words in a "public place," used in the statute; and the court, speaking through GREGORY, J., gives some excellent reasons for their opinion, as follows:

"An affray, like public indecency, is an offence exclusively against the public. The parties can not complain because they have brought the evil upon themselves. The public is injured by the terror produced, and the evil example. The offence consists not in fighting by agreement, but in fighting by agreement in a 'public place.' There may be a legal highway not a public place within the meaning of the

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Swales, Trustee, by Gaynor, Supervisor, v. Southard.

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statute. There may be, by the growth of timber or underbrush, a part of a highway perfectly concealed from public view, and as private as any place in the commonwealth." See *Jennings v. The State*, 16 Ind. 335; 4 Bl. Com. 65.

It is suggested that there is a difference between the words "in a certain highway," which were considered in the case cited, and the words "on a public highway," which we are now considering. We perceive no legal difference. Every highway is a public highway. In our statute the words are used as convertible terms. 2 R. S. 1876, p. 316. And there is no practical difference in the meaning of the prepositions *in* a highway and *on* a highway, and, as they are used in the context in the two cases, they mean the same thing. Nor will the averment that the act was committed in the presence of Scott Harvey and William Lindsey aid the indictment. It might have been done in a very secret place, and yet be in the presence of two persons. We must hold the indictment insufficient.

The judgment is reversed, the cause remanded, with instructions to sustain the motion to quash the indictment, and release the appellant from imprisonment.

Petition for a rehearing overruled.

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SWALES, TRUSTEE, BY GAYNOR, SUPERVISOR, v. SOUTHARD.

SUPREME COURT.—*Weight of Evidence*.—Where there is any legal evidence tending to support each material fact necessary to authorize the finding or verdict rendered in a cause, the Supreme Court will not disturb it, though, in the judgment of that court, the preponderance of the evidence is against it.

From the Dearborn Circuit Court.

*W. H. Bainbridge* and *H. D. McMullen*, for appellant.

*N. S. Givan* and *W. H. Matthews*, for appellee.

64	557
124	470
64	557
124	686

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Howk, C. J.—This was a suit before a justice of the peace, by the supervisor of a certain road district, in the name of the trustee of his township, against the appellee, as defendant, for obstructing a certain public highway, to recover a certain penalty provided therefor, in section 24 of "An act providing for the election or appointment of supervisors of highways," etc., approved March 5th, 1859. 1 R. S. 1876, p. 860.

The complaint charged the obstruction of the highway by the appellee, by his building and maintaining a rail fence thereon, for the distance of about fifty-five rods, in the centre of said highway.

The trial before the justice resulted in a verdict and judgment against the appellee, from which he appealed to the circuit court.

In this latter court, the cause was tried by a jury, and a verdict was returned for the appellee. The appellant's motion for a new trial having been overruled by the court, and his exception entered to this ruling, judgment was rendered for the appellee, upon and in accordance with the verdict.

The only error assigned here by the appellant is the decision of the court below, in overruling his motion for a new trial. The causes assigned for such new trial, in the motion therefor, were, that the verdict of the jury was not sustained by sufficient evidence, and that it was contrary to law.

It will be observed, that, by the record of this cause, and the error assigned thereon, only one question is presented for our decision, and that is, whether or not the verdict of the jury, in this case, is sustained by any sufficient legal evidence. Of course, it is not our province to weigh the evidence, or to attempt to settle this controversy by what we might regard as the preponderance of the evidence in the record. The rule for the determination of a cause in

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this court, where it appears, as in this case, that it has been probably decided, in the court below, on the mere weight of the evidence, is this: If the record contains any legal evidence tending to sustain each and every fact necessary to constitute a cause of action or cause of defence, this court will not disturb the finding or verdict in the case, upon what we might regard as the preponderance of the evidence. This rule, and the reasons for it, have been so often and so fully stated, in the numerous decisions of this court, in which the weight of evidence was the only question for decision, that we deem it unnecessary to cite authorities in support of such rule. See, however, *Cox v. The State*, 49 Ind. 568, the *Indiana Reports*, *passim*, and *Buskirk's Practice*, 237, *et seq.*

From our examination of the evidence in the record, in the case at bar, it seems clear to us, that there was legal evidence, introduced on the trial, tending, and sufficient, to sustain the verdict of the jury. Certainly, this is all that is requisite or necessary, on an appeal to this court, when the only question for decision is the sufficiency of the evidence to sustain the verdict. In such a case we can not, under the settled and long established rules of practice obtaining in this court, disturb the verdict of the jury.

We can not say that the court erred, and therefore we are bound to say that the court did not err, in overruling the appellant's motion for a new trial; for all the presumptions are in favor of the correctness of the court's decision in this regard. *Myers v. Murphy*, 60 Ind. 282.

The judgment is affirmed, at the appellant's costs.

*The South Side Planing Mill Ass'n et al. v. The Cutler & Savidge Lumber Co.*

THE SOUTH SIDE PLANING MILL ASSOCIATION ET AL. v. THE  
CUTLER & SAVIDGE LUMBER COMPANY.

**PROMISSORY NOTE.**—*Bond of Corporation, to Maker of Note, Assuming Payment thereof.—Principal and Surety.—Joint Action on Note and Bond.—Effect of Demurrer.—Consideration of Bond.—Misjoinder of Actions.—Judgment.*—A bond executed by the secretary, and on behalf, of a certain corporation as principal obligor, and by certain sureties, recited that "whereas" the obligee "has heretofore sold and delivered to the above bound" corporation certain property of a specified value, described in a schedule attached thereto; and whereas such principal "has assumed and agreed to pay, as part of the consideration for" such property, certain debts owing from the obligee to others, amounting to a specified sum, including a certain promissory note not then matured, executed by the obligee of the bond to another, calling for a certain sum with ten per cent. interest, without relief, payable in bank and endorsed by certain persons; "Now therefore, if the said" corporation shall pay such debts "according to the tenor and effect" thereof, and hold the obligee harmless thereon, "this bond shall be void." But if the said obligee shall be compelled to pay the same, then he "may have his action on this bond, against said corporation and the individuals joining as sureties herein, for the sums so paid by him," etc., and the judgment therein "shall be without relief," etc., and draw ten per cent. interest, etc. Complaint on such note and bond, by the payee, against the makers and endorsers of the note, and the principal and sureties in the bond, alleging the bond to have been executed by the corporation and its sureties.

*Held*, on demurrer to the complaint, that the sureties are liable to the obligee, jointly with the principal, on the bond, immediately upon the failure of the principal to pay off such note at maturity, and without his paying the same to the holder.

*Held*, also, that, on non-payment of such note, the payee may maintain a joint action on the bond and note.

*Held*, also, that the demurrer admits the allegation that the bond in suit is the bond of the corporation.

*Held*, also, that the bond purports to have been given on a sufficient consideration.

*Held*, also, that there was no misjoinder of actions.

*Held*, also, that the plaintiff was entitled to a judgment bearing ten per cent. interest, and without relief.

From the Marion Superior Court.

*D. V. Burns, H. W. Harrington and A. F. Denny*, for appellants.

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*The South Side Planing Mill Ass'n et al. v. The Cutler & Savidge Lumber Co.*

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*J. T. Dye and A. C. Harris, for appellee.*

BIDDLE, J.—Suit by appellee, against appellants. The appellants are so numerous, and the averments of the complaint so long, that it is impracticable to set out the complaint in full, but the material facts which present the questions involved may be stated as follows:

That the appellee is a corporation; that, on the 1st day of October, 1875, Henry H. Wheatley executed his promissory note, payable to the appellee, for five thousand two hundred and fifty dollars, eight months after date, with interest at the rate of ten per cent., negotiable and payable at McCord & Wheatley's Bank, Indianapolis, Indiana, without relief from valuation or appraisement laws; that Benjamin R. McCord and William M. Wheatley endorsed the note in their firm name of "McCord & Wheatley," waiving presentment for payment, protest, and notice of non-payment; that the note was given in payment for lumber, building material and merchandise delivered by the plaintiff to said Henry H. Wheatley, on the credit of the maker and endorsers, of all of which the endorsers had full knowledge at the time of the endorsement; that, at maturity, the note was presented for payment, and protested for non-payment, of which the endorsers had due notice; and that the note remains wholly unpaid.

That, on the 10th day of November, 1875, before the note became due, by a certain bond, executed to Henry H. Wheatley by "The South Side Planing Mill Association" and nineteen other individuals, whose names are stated, the said association "undertook, assumed and agreed to pay said note, as a part of the consideration for the purchase of certain real estate, personal and other property, then made of Henry H. Wheatley."

The bond is in the sum of fifty thousand dollars, in the

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The South Side Planing Mill Ass'n *et al.* v. The Outler & Savidge Lumber Co.

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usual form, payable to Henry H. Wheatley, with the following conditions :

"Whereas the above named Henry H. Wheatley has heretofore sold and delivered to the above bound 'South Side Planing Mill Association,' certain real estate, personal property, rights, credits and choses in action, amounting in the aggregate to the sum of seventy-seven thousand two hundred and thirty-two and  $\frac{15}{100}$  dollars, as shown by a schedule hereto attached, and made a part hereof, on which property there are certain encumbrances, amounting in the aggregate to the sum of thirty-four thousand seven hundred and seventy-three and  $\frac{2}{100}$  dollars, as appears by reference to said schedule. And whereas the said 'South Side Planing Mill Association' has assumed and agreed to pay, as a part of the consideration for the property so conveyed and assigned to her by the said Henry H. Wheatley, certain notes executed by said Wheatley to divers persons, amounting, in the aggregate, to forty-two thousand four hundred and fifty-nine and  $\frac{13}{100}$  dollars, as shown by a schedule attached and made a part hereof. And whereas the said corporation is further indebted to the said Wheatley, as a part consideration for said property, the sum of five thousand dollars, evidenced by two notes executed by said corporation to said Wheatley. Now, therefore, if the said 'South Side Planing Mill Association' shall well and truly pay, or cause to be paid, the above described notes, mentioned in the schedule attached, as well as the two notes above mentioned, executed by said corporation to said Wheatley, according to the tenor and effect of said notes, and shall hold the said Wheatley harmless by reason thereof; then, and in that event, this bond shall be null and void, otherwise in full force and virtue in law. But if the said Wheatley shall be compelled to pay the said notes executed by him and assumed by said corporation,

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or any part thereof, or if said notes executed by said corporation to said Wheatley are not paid, then, in either of such events, the said Wheatley may have his action on this bond, against said corporation and the individuals joining as sureties herein, for the sums so paid by him; and also, for any failure on the part of said corporation to pay said two notes, said Wheatley, besides the costs and expenditures incident to said action, may recover five per cent. on the amount found due him in said action, as liquidated damages; and any judgment so recovered shall be without any relief from valuation or appraisement laws, and shall draw interest at the rate of ten per cent. per annum.

"It is agreed and understood between the sureties herein, that, in the event that they, or either of them, shall be compelled to pay any money by reason of this bond, then the contributions by the other sureties shall be in the ratio of the stock heretofore subscribed for in said corporation by any such persons, to the whole amount heretofore subscribed, and shall be without any relief whatever from valuation or appraisement laws. In witness whereof," etc.

The appellants joined in a demurrer to the complaint, alleging as ground, that two causes of action were improperly joined.

"The South Side Planing Mill Association" demurred to the complaint, alleging as causes:

1. That the complaint does not state facts sufficient to constitute a cause of action; and,
2. That two causes of action are improperly joined.

The sureties in the bond demurred to the complaint, assigning as cause, that it does not state facts sufficient to constitute a cause of action. All of these demurrers were overruled by the court, and exceptions reserved. The appellants stood by their joint and several demurrers, and the court rendered judgment against them, collectible without relief



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from valuation or appraisement laws, and bearing interest at the rate of ten per cent. per annum.

Afterwards the obligors of the bond moved the court to modify the judgment as to them, so as to bear interest only at the rate of six per cent. and be collectible with relief. This motion was overruled, and they excepted to the ruling. Appeal to the general term, wherein the judgment at special term was affirmed. Appeal to this court.

The counsel for the appellants discuss five questions in their several briefs :

1. Could the obligee of the bond maintain an action against the sureties before he was damnified ?

The obligee of the bond could maintain an action against the sureties, whenever he could maintain an action against the principal in the bond. The sureties have undertaken to do whatever the principal was bound to do ; and whenever the principal failed to pay the note it had assumed and agreed to pay, at maturity, a right of action accrued in favor of the obligee.

But it is insisted, that no cause of action can arise against the sureties in the bond until the obligee has paid the note which the principal in the bond undertook to pay for the obligee. As amongst the obligors of the bond, and between the principal and sureties, the latter could have no action against the former, until they had been damnified by being required to perform what their principal ought to have done ; but this rule does not apply between the obligee and the obligors of the bond. The obligee is damnified and has his right of action as soon as the breach of the bond occurs. The principal in the bond has already received the amount of the note, as so much of the consideration paid on the property it bought of the obligee ; therefore the obligee of the note has already paid the amount of the note to the principal, Wheatley. Nothing could be more unnecessary than to require the maker to

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pay the note to the payee, which the principal obligor in the bond is bound to do, and thus to pay the note twice, before it could maintain this action on the bond, to recover the amount back. *Josselyn v. Edwards*, 57 Ind. 212.

2. It is insisted that it appears upon the face of the bond that it is without consideration. The bond does not present itself in that light to us. The sale of the property by the obligee to the principal in the bond is a consideration that fully supports the undertaking of the principal to pay the note in suit as part consideration of the purchase, and is also a sufficient consideration to support the bond against the sureties.

But it is said that the sale of the property by the obligee to the principal in the bond had taken place before the bond was executed, and that the bond was executed without any new or additional consideration. There is nothing on the face of the bond to inform us whether this is the fact or not. The averments imply that the facts were contemporaneous, and the demurrer admits them to be true.

3. That the bond was not properly executed by the corporation, the principal obligor. Upon demurrer to the complaint, which admits the execution of the bond as averred, there is no force in this objection. The bond purports to be executed by the secretary of the association, and is averred in the complaint, and admitted by the demurrer, to have been executed by the corporation.

4. The appellants think the court erred in rendering judgment bearing interest at the rate of ten per cent. per annum, and collectible without the benefit of valuation or appraisement laws, and in refusing to modify the judgment according to the appellants' motion. We think otherwise. The breach of the bond was in not paying the note sued on to the appellee, according to its tenor and effect. The judgment, therefore, was properly rendered according to the terms of the note. This is sufficient to sustain the judgment as rendered. But the bond does stipulate that

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any judgment the obligee may recover upon it "shall be without any relief from valuation or appraisement laws, and draw interest at the rate of ten per cent. per annum," and as the bond was made for the benefit of the appellee, it takes the same rights under it as those stipulated in favor of the obligee.

5. But it is said, "There are no equities in the case in favor of the appellee. She sold nothing to any of the appellants, and parted with no property on the faith of any promise made by any of them." We can not concur with this view of the case. It is true, the appellee could not sue the appellants at law, but, as the bond was made for the appellee's benefit, she has the same right under it as the obligee would have against the obligors. That a contract made by one person with another, for the benefit of a third, may be enforced in equity by the latter, is a principle that was settled soon after the present code went into effect, and has been consistently adhered to through a long line of decisions to the present time. *Bird v. Lanius*, 7 Ind. 615; *Kirk v. The Fort Wayne Gas Light Co.*, 13 Ind. 56; *Woodberry v. Duvall*, 15 Ind. 160; *Day v. Patterson*, 18 Ind. 114; *Merritt v. Wells*, 18 Ind. 171; *Lamb v. Donovan*, 19 Ind. 40; *Beals v. Beals*, 20 Ind. 163; *Johnson v. Britton*, 23 Ind. 105; *Devol v. McIntosh*, 23 Ind. 529; *Gwaltney v. Wheeler*, 26 Ind. 415; *Cross v. Truesdale*, 28 Ind. 44; *Hardy v. Blazer*, 29 Ind. 226; *Davis v. Calloway*, 30 Ind. 112; *Matheys v. Ritenour*, 31 Ind. 31; *Pierce v. Goldsberry*, 35 Ind. 317; *Scobey v. Finton*, 39 Ind. 275; *Miller v. Billingsly*, 41 Ind. 489; *McDill v. Gunn*, 43 Ind. 315; *Haggerty v. Johnston*, 48 Ind. 41; *Whitesell v. Heiney*, 58 Ind. 108.

The most of the authorities cited on behalf of the appellants are cases at law, upon indemnity bonds to save harmless generally from some thing which may or may not happen, not for the payment of a specific debt, or the performance of some particular thing, as in the present case. The

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way we read the case of *Redfield v. Haight*, 27 Conn. 31, cited by appellants, it seems to be directly against them, and fully in support of the views expressed in this opinion. The case of *Garnsey v. Rogers*, 47 N. Y. 233, also cited by the appellants, fully supports the principle settled in this State, but it was not applicable to that case, because the third person for whose benefit the contract was made was not the obligor in the debt secured, and was not bound to pay it; as if, in this case, the obligee of the bond should sue the obligor, for not paying a debt to the appellee, which the obligee was not bound to pay. Of course, in such a case, there could be no recovery. To require the obligee of the bond to pay the note sued upon to the appellee, (which the obligor, by the bond, had agreed to pay,) before he could recover against the obligors, as contended for by the appellants, would impose a circuitry of actions, expensive and useless, which would very much embarrass and retard the administration of justice; while, in one suit, with all the parties before the court, all their rights can be completely protected and properly adjusted.

We think the case was well decided.

The judgment is affirmed, at the costs of the appellants.

Petition for a rehearing overruled at the May Term, 1879.

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GRAHAM v. MARTIN.

**PROMISE OF MARRIAGE.—***Complaint for Breach.—Request of Performance.*

—In an action for a breach of a mutual promise to marry on a certain day, the complaint need not aver a request for performance.

**SAME.—***Place of Performance.*—The residence of the woman is, *prima facie*, the place of marriage, when the promise is silent on that point.

**SAME.—***Request of Performance.*—In an action for a breach of a mutual

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promise to marry, wherein the complaint avers the marriage of the defendant to another, it is not necessary to aver that the plaintiff had requested the defendant to fulfil the promise.

**SAME.—Readiness to Perform.—Instruction.—Evidence.**—An allegation of the readiness of the plaintiff to fulfil the marriage promise is material, and one which must be proved; and it was error to instruct the jury, in such case, that the plaintiff was entitled to recover on proof simply of the mutual promise and the defendant's marriage to another.

**SAME.—Preparation by Plaintiff to Marry.**—It is error to instruct the jury, that, in deciding whether the alleged promise had been made, they might consider evidence given of "any preparation" made by the plaintiff "for marriage."

**PRACTICE.—Special Demurrer.—Uncertainty.—Amendment.**—There is no special demurrer, under the code of this State, its place being occupied by the controlling power of the court to amend, render more certain or strike out pleadings or parts thereof.

**BILL OF EXCEPTIONS.—Short-Hand Reporter.**—A bill of exceptions prepared and filed conformably to the act of March 7th, 1873, 1 R. S. 1876, p. 769, concerning short-hand reporters, etc., is not invalid because it does not conform to the act of March 10th, 1873, 1 R. S. 1876, p. 770, on the same subject.

From the Henry Circuit Court.

*W. Grose, M. E. Forkner and E. H. Bundy, for appellant.*  
*J. Brown and J. M. Brown, for appellee.*

**PERKINS, J.**—Catharine Martin, on the 27th day of January, 1876, sued Thomas Graham for a breach of promise of marriage. Her complaint was in two paragraphs. The first charged, that, "On the 1st day of December, 1874, and at divers other days and times, before and after that time, at Henry county, Indiana, in consideration that the said plaintiff, being then and there an unmarried female, of the proper age to be joined in matrimony, at the special instance and request of said defendant, had then and there undertook and faithfully promised the said defendant to marry him on the 1st day of March, 1875, he the said defendant, undertook and faithfully promised the said plaintiff to marry her, on the 1st day of March, 1875, he, the said defendant, then being sole and unmarried.

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And the said plaintiff avers, that she, confiding in said promise and undertaking of said defendant, after the making of said promise by said defendant, and before and ever since, to wit, at the county of Henry and State aforesaid, was and has been ready and willing to marry said defendant, and at the time and at the place aforesaid, or at any other time before or afterward; that although said plaintiff had promised and was willing to marry the said defendant aforesaid, as defendant well knew, yet said defendant did not and would not marry the plaintiff on the said 1st day of March, 1875, nor at any other time, but on the contrary, on the — day of January, 1876, said defendant married one — Bales. Wherefore," etc.

"Par. 2. The said plaintiff further complains of the defendant, and says that heretofore, to wit, on the 1st day of December, 1874, and at divers other days and times before and after that time, at the county of Henry and State of Indiana, the said defendant, in consideration that the plaintiff, who was then sole and unmarried, and of the proper age to marry, had then and there, at the special instance and request of said defendant, undertaken and promised the defendant that she would marry him, the defendant, in consideration of which promises on the part of the plaintiff at the said divers times aforesaid, the said defendant did then and there faithfully promise, agree and undertake to marry the plaintiff in a reasonable time then next following; and the plaintiff avers, that she, confiding in said promise and undertaking of the said defendant, hath always hitherto remained and continued single and unmarried, and hath been, for and during all the time aforesaid, up until the — day of January, 1875, ready and willing to marry the said defendant at all times and places, of which the defendant has always had notice, and although a reasonable time for the said defendant to marry her, the said plaintiff, hath elapsed since the making of

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said promise and undertaking of the said defendant, and although the said plaintiff, after such reasonable time had elapsed, and at divers times, has requested said defendant to marry her, yet the said defendant, not regarding his said promise and undertaking, contriving," etc., "did not nor would within such reasonable time aforesaid, nor when requested as aforesaid, nor at any other time, marry her, but hath hitherto failed and refused so to do, and on the — day of January, 1876, married — Bales. Wherefore," etc.

Demurrers were overruled to the paragraphs of complaint, and exceptions entered.

Answer, the general denial. Trial by jury, verdict for the plaintiff for sixteen hundred and fifty dollars. Motion for a new trial overruled, and judgment on the verdict.

The errors assigned are two:

1. Overruling the demurrers to the paragraphs of the complaint; and,
2. Overruling the motion for a new trial.

The objections are several to the paragraphs of the complaint.

To the first paragraph the objection is, that it does not aver a request by the plaintiff to the defendant to marry her.

To the second paragraph the objection is, that it does not aver, that the request made was made at the proper time.

The objection to the first paragraph is unsubstantial. That paragraph alleged a promise to marry upon a particular day. Where nothing is said as to the place, in such a contract, the house of the prospective bride would, *prima facie*, by the custom of society, be the place contemplated for the marriage; and by that custom, also, it would be the duty of the groom to present himself at that place,

without special request, to fulfil the marriage engagement.

The second paragraph contains the substance of a good complaint. It would have been good upon general demurrer, at common law. It might have been subject to a special demurrer; but we have no special demurrer. Its place is occupied by the controlling power of the court to amend, render more certain, or strike out pleadings, or parts thereof, on the application of the opposite party; and, if the exercise of this power is not invoked, the defect in the pleading, that might be properly corrected by its exercise, is waived. 3 Cooley's Bl. Com. 315, note.

What we have said on this point has been said upon the theory that a request was necessary. But the form in Chitty contains no averment of request. It is, in its substantive parts, as follows:

"For that the plaintiff and defendant agreed to marry one another, and a reasonable time for such marriage has elapsed, and the plaintiff has always been ready and willing to marry the defendant; yet the defendant has neglected and refused to marry the plaintiff." See the numerous cases cited in the notes to this form, that a request need not be averred. 2 Chitty Pl. 205; *Clements v. Moore*, 11 Ala. 35 (this case is directly in point); *Hook v. George*, 108 Mass. 324.

This doctrine is in accordance with the theory, that the groom should seek the bride, and not subject the prospective bride to the indelicacy of searching for, and demanding of, the prospective groom the fulfilment of his engagement. "The man is *ducere uxorem*." 'The modesty of the sex is considered by the common law,' says Lord Coke. 'It can hardly be expected that a lady should say to a gentleman, "I am ready to marry you, pray marry me."'" 2 Parsons Con., 6th ed., p. 61.

It is not necessary that we decide the point in this case. See *King v. Kersey*, 2 Ind. 402.



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We proceed to the second error assigned, viz., the overruling of the motion for a new trial.

The appellee contends that this assignment of error presents no question to the court, for the reason that a complete bill of exceptions is not in the record. He says, the bill was made up under the act of March 10th, 1875, touching reporters, etc., and does not conform to the requirements of the act. 1 R. S. 1876, p. 770.

It is true that the provisions of that act have not been complied with, and it is equally true that the bill was not prepared under that act, but was under the act of March 7th, 1873, the provisions of which act have been substantially complied with. 1 R. S. 1876, p. 769. The bill of exceptions is in the record, and is perfect.

The causes assigned therefor, in the motion for a new trial, were seven, viz.:

1. Damages excessive;
2. Verdict against law and the evidence;
3. Error of law, occurring at the trial, in refusing and in admitting evidence;
4. Error in giving instructions from one to eight, inclusive;
5. Misconduct of the jury;
6. Newly-discovered evidence; and,
7. Misconduct of one of the jurors in said cause.

We will first examine the instructions of the court.

The fourth is as follows:

"If the jury believe, from a preponderance of the evidence, that there was a mutual promise or agreement to marry, between the plaintiff and defendant, substantially as stated in either paragraph of the complaint, and that the defendant married another lady before the commencement of this action, they should find for the plaintiff."

In *Hook v. George*, 108 Mass. 324, it is said:

"The plaintiff alleges in her declaration, that she and the

Cotton, Executrix, v. The State, *ex rel.* Roberts, Guardian.

defendant were engaged to be married to each other; that she was always ready on her part to fulfil the engagement; and that the contract was broken by the defendant. All these are material averments, as to which the burden of proof is upon her."

The complaint, in the case at bar, contains like averments, but according to the instruction, the plaintiff was not bound to prove that she was ready and willing to marry the defendant. This was error. See, also, Chitty on Pleading, and notes, *supra*.

Objection is made to the following portion of the seventh charge, viz., that the jury, in deciding whether a contract of marriage existed between the parties, might consider the fact as to any preparation the plaintiff might have made for marriage, etc.

In *Russell v. Cowles*, 15 Gray, 582, it is decided, that, "In an action for breach of promise of marriage, evidence of preparations for performing the contract, made by the plaintiff in the absence of the defendant, and not in any way connected with him, is inadmissible to prove the plaintiff's assent to a mutual promise of marriage."

We think this decision asserts the better law. 2 Parsons Con. 62.

Other points made are not important in the present state of the case.

The judgment is reversed, with costs, and cause remanded for another trial.

COTTON, EXECUTRIX, v. THE STATE, EX REL. ROBERTS,  
GUARDIAN.

64	573
143	646
64	573
166	502

GUARDIAN AND WARD.—*Complaint on Bond.—Variance.—Copy.*—A complaint on a guardian's bond alleged the execution, and contained a copy,

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Cotton, Executrix, v. The State, *ex rel.* Roberts, Guardian.

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thereof, but there was a variance between the description given in the complaint and such copy.

*Held*, on demurrer, that the copy controls.

*SAME.—Defective Record.—Amendment.—Supreme Court.*—The record of such cause, on appeal to the Supreme Court by the defendant, omitted the copy of the bond alleged by the complaint to be filed therewith, but an alleged copy thereof was separately attached to the record at the place where it ought to have been inserted.

*Held*, that the record shows that a copy of the bond was filed with the complaint as alleged.

*SAME.—Default of Guardian, After Death of Surety.*—The estate of a deceased surety on a guardian's bond is liable for a default of the principal occurring after the death of the surety, but before final settlement of his estate.

*SAME.—Separate Actions on Bond.—Judgment in One, not a Bar to Another, Action.—Former Adjudication or Recovery.*—A guardian and his sureties are liable on his bond, for a breach thereof, to each of several wards for whose benefit the bond was executed, in a separate action thereon by each ward on attaining his majority. And the judgment rendered in an action thereon by one of the wards is no bar to a subsequent action thereon by another ward or his guardian.

From the Jefferson Circuit Court.

*W. T. Friedley*, for appellant.

*C. A. Korbly* and *E. T. Dickey*, for appellee.

*Howk, C. J.*—This was a suit by the appellee, on the relation of the guardian of the minor heirs of William Splain, deceased, against the appellant and a number of other defendants, on the bond of Franklin Joyce, as the former guardian of the relator's wards and other heirs, then minors, of said William Splain, deceased. This bond was in the penal sum of fifty thousand dollars, was dated March 19th, 1864, was executed, among others, by the appellant's testator, Benjamin Tevis, and was conditioned that the said Joyce would faithfully discharge his duties as guardian of the persons and property of the then minor heirs of said William Splain, deceased, of three of which minor heirs the relator afterward became the legal guardian.

The complaint was in one paragraph, and it was

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Cotton, Executrix, v. The State, *ex rel.* Roberts, Guardian.

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alleged therein that the said Joyce had committed divers breaches of his trust, as the former guardian of the relator's wards.

The appellant separately demurred to the relator's complaint, for the want of sufficient facts therein to constitute a cause of action; and, jointly, with her codefendants, she also demurred to each breach assigned in said complaint, upon the same ground of objection, which demurrers were overruled by the court, and to these decisions the appellant excepted.

The appellant separately answered in nine paragraphs, the first of which was a general denial, and each of the others set up affirmative matter by way of defence. The appellee's relator demurred to each of the affirmative paragraphs of the appellant's answer, for the alleged insufficiency of the facts therein to constitute a defence to the relator's action, which demurrer was overruled as to the second, third, sixth and seventh paragraphs, and was sustained by the court as to the fourth, fifth, eighth and ninth paragraphs of said answer, to which latter decision the appellant excepted. The relator then replied, by a general denial, to the second, third, sixth and seventh paragraphs of the appellant's separate answer.

The issues joined were tried by the court, and a finding was made for the appellee's relator, assessing his damages in the sum of nine thousand and eighty-two dollars and forty cents; and judgment was rendered upon and in accordance with said finding, from which judgment the appellant alone has appealed to this court.

The appellant has here assigned, as errors, the following decisions of the circuit court:

1. In overruling her demurrer to the relator's complaint;
2. In overruling her demurrer to each of the breaches assigned in the complaint;

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Cotton, Executrix, v. The State, *ex rel.* Roberts, Guardian.

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3. In sustaining the demurrer to the fourth paragraph of her answer ;

4. In sustaining the demurrer to the fifth paragraph of her answer ;

5. In sustaining the demurrer to the eighth paragraph of her answer ;

6. In sustaining the demurrer to the ninth paragraph of her answer ; and,

7. In overruling her demurrer to the relator's reply to her separate answer.

We will consider and decide the several questions presented and discussed by the appellant's counsel, in his brief of this cause in this court, in the same order in which he has presented them.

1. It is insisted by the appellant that her demurrer to the relator's complaint ought to have been sustained, because, it is said, there is a fatal variance between the bond in suit, as described in the complaint, and the copy of said bond therewith filed. This point is not well taken. The appellant's testator appeared to have been a maker of the bond sued upon, as it was described in the complaint, and in the said copy thereof, and any other variance between the description and the copy could not injure the appellant in her defence of this suit. If there is any variance between the copy of the instrument in suit and the attempted description thereof in the complaint, the rule is that the copy controls and will be presumed to be right, until the contrary is shown. *Mercer v. Hebert*, 41 Ind. 459 ; *Stafford v. Davidson*, 47 Ind. 319 ; and *Crandall v. The First National Bank of Auburn*, 61 Ind. 349. In this case, the variance was immaterial, in so far as the appellant was concerned, for it appeared both from the description and the copy of the bond, that the appellant's testator, Benjamin Tevis, had been one of the makers thereof.

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Cotton, Executrix, v. The State, *ex rel.* Roberts, Guardian.

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It is alleged in the complaint, that a copy of the bond sued on was filed therewith and made part thereof. In making up the transcript of the record of this cause on file in this court, the clerk of the court below apparently omitted to transcribe at the proper place the copy of the bond filed, and did not discover the omission until the transcript was completed. He then made a copy of the bond, on a separate paper, and pasted it on the transcript at the point where it ought to have been inserted. This does not show, as it seems to us, that a copy of the bond was not in fact filed with the complaint, but it shows, if any thing, the very reverse. For the transcript on this appeal was, of course, procured and filed in this court by the appellant, and we can not believe that she would have prepared and pasted a copy of the bond on the transcript, unless such copy of the bond had in fact been filed with the complaint. The court did not err, we think, in overruling the appellant's demurrer to the relator's complaint.

2. The second error assigned by the appellant is not even noticed by her counsel, in his argument of this cause. Under the well settled practice of this court, therefore, this alleged error must be regarded as waived.

3. The third alleged error is the decision of the circuit court in sustaining the relator's demurrer to the fourth paragraph of the appellant's answer. In this fourth paragraph of her answer, the appellant alleged, in substance, that her testator, Benjamin Tevis, died on the — day of November, 1868, at Jefferson county, Indiana, and that letters testamentary on said decedent's estate were then issued to the appellant, by the court of common pleas of said county, in which court the guardianship of the minor heirs of William Splain, deceased, was then pending; that the defalcation and breaches of the bond in suit, and the failure to discharge the duties of said trust, alleged in the relator's complaint, took place long after the death of said Ben-

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Cotton, Executrix, v. The State, *ex rel.* Roberts, Guardian.

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jamin Tevis, and long after letters testamentary had been granted her, as such executrix, and long after partial reports made by said guardian after the death of said Tevis had been presented and passed upon, and said guardianship continued, by said court of common pleas; that the said moneys, etc., in said complaint mentioned, were in the hands of said guardian at the time of the death of said Tevis, and of the granting of said letters testamentary on his estate, and of said first partial report and the continuance of said guardianship by said court, after the death of said Benjamin Tevis, and that the defalcations, or breaches in the bond sued on, had occurred since then, and not otherwise. Wherefore the appellee's relator ought to take nothing against the estate of said Benjamin Tevis, deceased.

It will be seen from the averments of this fourth paragraph of answer, that it is founded upon the theory, that the estate of a deceased surety upon a guardian's bond is not liable for a default of the guardian, which occurred after the death of such surety. The law has been settled contrary to this theory by this court, and we think correctly so. In the case of *Voris v. The State, ex rel., etc.*, 47 Ind. 345, which was a suit upon a guardian's bond, the same defence was relied upon as the appellant has stated in the fourth paragraph of her answer; and it was held to be settled by the authorities, that the estate of a deceased surety on such a bond was liable for a default which occurred subsequently to the surety's death. We adhere to that decision; and, upon its authority, we hold, that no error was committed by the court below, in the case now before us, in sustaining the relator's demurrer to the fourth paragraph of the appellant's answer. See, also, the case of *Toland v. Stevenson*, 59 Ind. 485, and authorities cited, in support of the same doctrine.

4. The fourth error assigned is the sustaining of the relator's demurrer to the fifth paragraph of the appellant's

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answer. This fifth paragraph of answer stated substantially the same facts, but more fully and specifically, which were relied upon by the appellant in the fourth paragraph of her answer, as a defence to the relator's action. The grounds of the defence stated in the two paragraphs were identical. This defence, as we have seen in considering the third alleged error, was founded upon a mistaken view of the law, and was insufficient. In our opinion, therefore, the relator's demurrer to the fifth paragraph of the appellant's answer was correctly sustained.

5. The fifth error complained of by the appellant is the decision of the court below, in sustaining the relator's demurrer to the eighth paragraph of her answer. In this paragraph of her answer, the appellant alleged, in substance, that, on the — day —, in the court of common pleas of Jefferson county, the plaintiff commenced three different actions on said bond sued on, against all the defendants named in this action, and the said executrix of Benjamin Tevis, deceased, appeared in said actions and pleaded therein, denying the plaintiff's right of action, and setting up that said alleged defalcations were made long after the death of said Benjamin Tevis, and that such proceedings were had, that judgment was rendered in favor of said executrix, and said estate of said decedent was released from liability on said bond, and that judgment was rendered on said bond, in each of said actions, against said other defendants, in the aggregate sum of over seven thousand dollars, copies of the records of each of which said actions were filed with and made parts of said paragraphs of answer, and that said judgments were still standing in full force and unreversed.

It is quite clear, we think, that the allegations of this paragraph were not sufficient to constitute a good answer of former adjudication or former recovery, as between the appellant and the appellee's relator, in this action. It was



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not alleged in said paragraph, that the relator in this suit was a party to either of the three actions mentioned therein, and such an allegation was absolutely indispensable to make the paragraph a good defence to the relator's action. The bond in suit was executed, as we have seen, on the 19th day of March, 1864, in the penalty of fifty thousand dollars, and it was conditioned that the said Joyce would faithfully discharge the duties of his trust, as guardian of the minor heirs of William Splain, deceased. The minor heirs named in said bond were ten in number, and each one of these heirs, as he came of age, or the subsequent guardian of any of them who were still minors, would have separate causes of action, and could maintain separate suits on the bond sued on, in the name of the State of Indiana, as plaintiff, on his or her relation. But surely judgments rendered in favor of the appellant in any of these suits could not be pleaded in bar of another suit on said bond, in favor of another relator, who was not a party to any of the suits in which such judgments were rendered. In our opinion, the court committed no error in sustaining the relator's demurrer to the eighth paragraph of the appellant's answer.

6. What we have said in relation to the fifth error is equally applicable to the sixth alleged error, namely, the sustaining of the relator's demurrer to the ninth paragraph of the appellant's answer. In this paragraph of her answer, the appellant alleged, in substance, that said plaintiff, in two suits, one on the relation of Henry F. and Eliza Bear, brought in the Jefferson Circuit Court at its September term, 1873, on the bond now in suit, against the said defendants, recovered judgment against all the defendants except the appellant, and such proceedings were had in said actions, that the estate of said Tevis was discharged, and judgments were rendered in favor of the appellant, and that the said judgments were still standing in full force, unreversed and unappealed from.

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*Cravens et al. v. Kitts.*


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It will be observed that it was not alleged in this paragraph, that the appellee's relator in this suit was a party to either of the actions mentioned in said paragraph. For the want of such an allegation, we are clearly of the opinion that the paragraph was insufficient, and that the demurrer thereto was correctly sustained.

7. The seventh alleged error is not apparent in the record. The only reply filed by the appellant was a general denial, and there is no demurrer to this or any other reply to be found in the record.

The judgment is affirmed; at the costs of the appellant, to be levied of the estate of her testator, Benjamin Tevis, deceased, in her hands to be administered.

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CRAVENS ET AL. v. KITTs.

**CONVEYANCE.—Deed Intended as Mortgage.—Verbal Promise to Reconvey.—Sale by Mortgagee.—Complaint by Mortgagor's Widow, for Partition and to Quiet Title.—Fraud.**—In an action to partition and quiet title to lands of an intestate, brought by the widow against the heirs and A. and B., the complaint alleged, that the intestate died seized of the lands in fee-simple, and that the widow and heirs had been continuously in possession thereof since his death, except during a period when they were absent from the State; that, in the lifetime of her husband, and contemporaneous with his enlistment in the army, she joined with her husband in a warranty deed of conveyance of the lands to A., to secure the payment of a debt of one hundred dollars, which A. falsely represented to her was owing to him from the husband, and to secure certain sums of money which A. was to pay on other debts, which he falsely represented to her were owing from her husband to third persons; that A., at the time, verbally promised them to reconvey the lands on request, upon payment to him of the sums thus secured; that, within a few days after the death of the husband, A. conveyed the lands to B. for three thousand dollars, being the actual value thereof at the time of such conveyances; that B. had paid to A. eight hundred dollars of the purchase-money, and the residue remained yet due; that certain Missouri lands, which A. proposed to convey to her husband "were wholly worthless for any purpose;" and that the lands, when conveyed to A., were subject to a certain mortgage which remains unpaid.

*Held*, on demurrer by A. and B., that the complaint is sufficient.

64	581
129	140
64	581
130	140
64	581
140	006

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*Cravens et al. v. Kitts.*

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**SAME.**—*Answer of Failure to Tender Reconveyance of Consideration.*—A. answered such complaint, alleging that part of the consideration for the conveyance to him was a title-bond, executed by him to the husband "to certain real estate in Missouri;" that afterward, on the request of the husband, he conveyed such lands to a son of the latter; and that no reconveyance had been tendered.

*Held*, on demurrer, that the answer is insufficient.

**SAME.**—*Estoppel.—Declaration to Purchaser by Mortgagor in Possession.—Notice.*—B. answered such complaint, alleging that, prior to his purchase of the lands, he caused inquiry to be made of the decedent in his lifetime, "as to what interest he had in the" lands, to which he replied that he was "in possession merely as" A.'s tenant; and B. alleged that thereupon he purchased the lands, relying upon such statement, without notice of the fraudulent representations and for value.

*Held*, on demurrer, that the answer is insufficient.

**SAME.**—*Widow.—Witness.*—The widow is an incompetent witness, in such an action, as to any matter relating to the alleged agreement to reconvey.

From the Ripley Circuit Court.

*B. Harrison, C. C. Hines and W. H. H. Miller*, for appellants.

*E. P. Ferris, W. W. Spencer and J. D. Skeen*, for appellee.

**PERKINS, J.**—Suit for partition and to quiet title. The complaint is in two paragraphs, of which the following is a copy of one:

"Sarah Kitts complains of the defendants, and says, that, on the 14th day of October, 1873, David H. Kitts departed this life intestate, and the owner in fee-simple of the following real estate, in Ripley county, Indiana, viz., the east half of the north-west quarter of section 27, and all of the north half of the north-east quarter of said section 27 that lies west of the old plank road, all in township 8 north, of range 11 east, containing one hundred and twenty-four acres, more or less; and that the north half of the last described tract was encumbered with a mortgage to the surplus revenue school fund, to the amount of \$139; and plaintiff avers that she is the widow of said David H. Kitts, deceased, and as such is entitled to the one-third in

value of said real estate. And she says that Sarah E. Pribble is a daughter of said David H. Kitts, and the wife of her codefendant John S. Pribble, and that James Kitts is a son, and Arvilla P. S. Sallie is a granddaughter of said David H. Kitts, the only child of Jane Sallie, formerly a daughter of said David H. Kitts, but who died in August, 1873; and plaintiff says that Jacob Kitts and Mary Kitts are each minors and the children of said David H. Kitts, and that these are all his legal heirs and representatives. And the plaintiff says that the children and grandchildren of said David H. Kitts, as above named, are each entitled to one share in the remaining two-thirds of said real estate aforesaid.

“And plaintiff says, that, on the 13th day of January, 1864, she and her husband mortgaged said real estate, by a warranty deed in form, to James H. Cravens, on the following condition: That said Cravens represented to plaintiff that David H. Kitts was indebted to him in the sum of one hundred dollars, or near that amount, and said David H. Kitts was then about enlisting in the army, and that, when he returned from the army, he, said Cravens, would reconvey said land to said Kitts at any time when desired to do so, on receipt of the money expended for the benefit of said Kitts by said Cravens. And plaintiff says, that said Kitts remained in the possession of said premises, and his family resided on said land all the time except about three years, when they removed to the West, and returned on the — day of October, 1871; and plaintiff says she is now in possession of said premises, and has been for two years last past; and plaintiff says, that, on the 31st day of October, 1873, said Cravens deeded said land to William D. Willson for the sum of three thousand dollars, of which two thousand are yet unpaid; and plaintiff says, that, at the time she and her husband mortgaged said land to said Cravens, and at the time he con-

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*Cravens et al. v. Kitts.*

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veyed said land to said Willson, the land was of the value of three thousand dollars; and plaintiff asks that one-third part in value of said land be set off to her, and that her title be quieted," etc.

In the other paragraph, plaintiff says, that, to induce her to sign said mortgage, said Cravens represented to her, among other things, that her husband was largely indebted, and, unless the farm was conveyed to him, they would soon be out of a house and home, etc., which she denies to have been true. And, further, that a parcel of Missouri land which said Cravens proposed to convey to said Kitts "was wholly worthless for any purpose."

Demurrers to the complaint by Cravens and Willson were overruled, and exceptions saved.

Answer of defendants Cravens and Willson jointly:—

The general denial.

Said Willson answered, in a separate paragraph, that, "before he purchased the real estate named in the complaint, of his codefendant James H. Cravens, he caused inquiry to be made of the said David H. Kitts, as to what interest he had and owned in said real estate, and was informed by said Kitts that he had no interest therein, but was in possession merely as a renter under the said James H. Cravens; and that, relying upon the said representations, he purchased the said real estate in good faith, and for a valuable consideration, and without notice of the frauds alleged."

Said James H. Cravens, for separate and further answer, said, that, for a part of the consideration of the purchase of said land, he made and executed a title-bond to certain real estate in Missouri, and afterward, at the special instance and request of said Kitts, executed a deed to the same to James Kitts, a son of said David H. and Sarah Kitts, and that a deed for said land, reconveying the same, has not been tendered to him, etc.

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*Cravens et al. v. Kitts.*

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Demurrers to the second and third paragraphs of answer were severally sustained, and exceptions entered.

Trial by jury; general verdict as follows:

"We, the jury, find for the plaintiff.

"H. KNOWLTON, Foreman"

Accompanying the verdict were the following answers to interrogatories:

"1. Was the deed from David H. Kitts and Sarah Kitts, plaintiff, to James H. Cravens, signed by her in the office of the defendant Cravens, or the drug store of Jehiel H. Mullen, and who were present when it was signed?

"Ans. 1st. In the office of James H. Cravens.

"Ans. 2d. James H. Cravens, David H. Kitts and Sarah M. Kitts.

"2. Did the plaintiff, Sarah Kitts, go to the place where she signed the deed, for the purpose of signing a deed, and, if so, to whom and for what land?

"Ans. She did not.

"3. If she went to sign a deed, did she afterward change her mind and conclude not to sign a deed, and, if so, at what time and where?

"Ans. She did not go to sign a deed, but was afterward induced to sign it.

"4. Were any representations made to the plaintiff, Sarah Kitts, by defendant Cravens, before she signed the deed? if so, what were the representations, when were they made, and if made were they false, and if made were they relied upon by her, and would she have signed the deed but for the representations?

"Ans. He did make representations, in substance, that her husband was much involved in debt, and that there was a school-fund mortgage upon the property, and, unless they deeded that property to him, the officers of the law would come in and take their property from them, and that, if they would deed the property to him, he would

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*Cravens et al. v. Kitts.*

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pay off said mortgage, and pay the taxes on the property, while he, Kitts, was in the army, and that, when he, Kitts, paid back to him the amount thereof, he, Cravens, would reconvey the land to them. These representations were made at the time of signing the deed, and were false, but were relied upon by the plaintiff, and she would not have signed the deed, only for the representations.

“H. KNOWLTON, Foreman.”

A motion for a new trial was overruled, and judgment quieting title and for partition rendered. Exceptions were saved.

Commissioners to make partition were appointed and qualified, and they discharged that duty, giving one-third of the land to Mrs. Kitts, and two-thirds to Willson, the purchaser from Cravens, leaving the latter with eight hundred dollars he had received in his hands.

The errors assigned on appeal to this court are:

1. The overruling of the separate demurrers to the paragraphs of the complaint;
2. The sustaining of the demurrers to the affirmative paragraphs, severally, of the answers;
3. The overruling of the motion for a new trial.

We proceed to consider the errors assigned.

The court did not err in overruling the demurrers, severally, to the paragraphs of the complaint. Those paragraphs showed that the conveyance by Kitts to Cravens, though absolute in terms, was but a mortgage. This fact could be shown by parole evidence, and was properly averred in the complaint. See the cases collected in 2 Davis New Ind. Dig. p. 981; *Butcher v. Stultz*, 60 Ind. 170. Those paragraphs showed further, that the amount, the payment of which was secured by said mortgage, was about one hundred dollars, to which were to be added amounts that might be advanced by Cravens to or for Kitts; that, on the seventeenth day after the death of Kitts, Cravens wrongfully sold said real estate to

one Willson, receiving cash in hand, on said sale, several hundred dollars over and above what his claims on Kitts amounted to, so that he had more than reimbursed himself out of the property, as well as disabled himself to reconvey it.

To state the matter shortly: The complaint showed that the property of which partition was sought was mortgaged. And if partition can be had of real estate under mortgage, then the complaint in this case was good. That such may be the case, and that all equities may be adjusted in the partition suit, is settled law in this State. *Francis v. Porter*, 7 Ind. 213; *Godfrey v. Godfrey*, 17 Ind. 6; *Milligan v. Poole*, 35 Ind. 64.

The court did not err in sustaining the demurrer to the second paragraph of the answer of Willson. It asserted, that, before he purchased of Cravens, he inquired of Kitts as to his interest in said real estate, and received for answer that he had none; but the paragraph did not aver that he informed Kitts of his intention to purchase the land. Hence, the answer of Kitts created no estoppel. *Williams v. Jackson*, 28 Ind. 334.

Again, he purchased while the appellee was in possession, and this fact might have been notice to him of her right in the property. *Johnston v. Glancy*, 4 Blackf. 94; *Crassen v. Sworeland*, 22 Ind. 427. Further, he had notice before the payment of all the purchase-money. Hence, for this reason, he can not be regarded as a *bona fide* purchaser. *Lewis v. Phillips*, 17 Ind. 108.

The second paragraph of Cravens' answer does not show the location of the Missouri land alleged to have been conveyed, its quality nor value. It may have been no more than a foot square, and worthless. If we suppose that to be included in the contract, as a part of what Kitts was to reimburse Cravens for, on redemption of his farm, it is not shown that it, with the other items, amounts to the cash



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*Cravens et al. v. Kitts.*

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payment of \$800, received from Willson by Cravens. We can not say that the court erred in sustaining the demurrer to it—that the defendant was in any way injured by this ruling. We may add, that, as a paragraph of answer, it neither denied nor avoided the allegations in the complaint.

We proceed to the third and last error assigned, viz., the overruling of the motion for a new trial.

The causes assigned in the motion for a new trial were :

1st. Verdict contrary to law and unsustained by evidence ;

2d. Specified errors of law occurring at the trial.

These will be considered.

As to the first cause assigned for a new trial, we can not say that it exists.

As to the second, counsel make it more definite in their able brief. We quote :

“The next point we make is, that the court erred in the admission and exclusion of testimony. The court allowed Mrs. Kitts, the plaintiff, to testify to matters that occurred prior to the death of her husband, but refused to permit the defendant Cravens to testify as to such matters.”

We copy from the bill of exceptions :

“Sarah Kitts, being duly sworn as a witness, testified as follows :

“I am the plaintiff, and the widow of David H. Kitts, deceased, and the same who made the deed to James H. Cravens for the land in dispute ; David H. Kitts died October 14th, 1873.” Here the defendant objected to the competency of Mrs. Kitts to testify as a witness, in this case, as to any matter which occurred prior to the death of David H. Kitts, for the following reasons :

1. Because the suit is on a contract made with her husband, during his life, and hence is a suit by her, as the heir of her husband, to set aside the said contract, and thus affect real estate.

2. Because it is a suit by an heir, on a contract with, and to affect real estate owned by, him. Objection overruled by the court, and the defendants at the time excepted; and the witness testified generally and fully as to all matters in controversy in the cause, those occurring before, as well as after, the death of Kitts.

The following is the provision of the statute:

“That in all suits by or against heirs, founded on a contract with or demand against the ancestor, the object of which is to obtain title to or possession of land or other property of such ancestor, or to reach or affect the same in any other way, neither party shall be allowed to testify as a witness as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party or the court trying the cause,” etc. 2 R. S. 1876. p. 135.

We have already seen, that Mrs. Kitts was allowed to testify generally. James H. Cravens, a defendant below and a party to the contract of conveyance of the land in question in this suit, was introduced as a witness, on the part of the defence. At a certain point, the bill of exceptions states: “Here the defendants offered to prove by the witness, that he traded to Kitts one hundred and sixty acres of land in Benton county, Missouri, and assumed payment of the school mortgage and the taxes then due on the place, and to let the family of Kitts remain on the place a year, free of rent, for the place in suit, the plaintiff not being present when the trade was made.” The plaintiff objected, the court sustained the objection, and the defendants, at the time, excepted.

As to the testimony of Mrs. Kitts, it seems to us, that, according to the decisions of this court, heretofore made, the court erred in overruling the objections to Mrs. Kitts’ testifying to matters occurring prior to the death of her husband.

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*Hiatt et al. v. Renk.*


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There are two provisions in the 2d section of the act defining who shall be competent witnesses, etc., the second of which we have copied above. The first relates to cases in which administrators, executors and guardians are parties, and the second to those in which heirs are parties. The subject-matters of the suits, under the sections, may be different, but their construction, as to the competency of witnesses, must be governed by the same rule.

In *Goodwin v. Goodwin*, 48 Ind. 584, it is said, in the opinion of the court: "It is urged, that this statute is not applicable in this case, because no judgment could be rendered for or against the estate represented by the executor. If the statute is to be literally understood, this is true. But this court has not regarded the very letter of the statute in putting a construction upon it. On the contrary, it has rather sought so to construe it as to give effect to the obvious intention of the Legislature in its enactment. *Ketcham v. Hill*, 42 Ind. 64; *Peacock v. Albin*, 39 Ind. 25." *Hoadley v. Hadley*, 48 Ind. 452; *Malady v. McEnary*, 30 Ind. 273; *Skillen v. Skillen*, 41 Ind. 260; *Voiles v. Voiles*, 51 Ind. 385; *Denbo v. Wright*, 53 Ind. 226.

The judgment is reversed, with costs; cause remanded for another trial, etc.

Petition for a rehearing overruled.

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#### HIATT ET AL. v. RENK.

**NEW TRIAL.**—*Compelling Trial Without Issue.*—*Waiver.*—Irregularity, in compelling the defendant to go to trial without requiring a reply to a special answer, is cause for a new trial, but is waived by his failure to give evidence under such answer.

**SAME.**—*Striking Out Answer Filed Without Leave.*—*Bill of Exceptions.*—*Judgment on Pleadings.*—A cause pending on a rule to reply having been announced by the parties, several days before the time fixed to try it, as

64	590
147	436
64	590
151	81
64	590
153	676

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ready for trial, the defendant afterward filed an additional answer without leave of court, and, when the cause was called for trial, he objected that it was not at issue, whereupon the court struck out the additional answer and tried the cause without a reply.

*Held.* the answer struck out not being made part of the record by bill of exceptions, that the action of the court was proper, and that the defendant is not entitled to judgment on the pleadings.

**INTEREST.**—*Voluntary Payment of.—Recoupment.—Promissory Note.—Case Overruled.*—Interest at the rate of ten per cent., voluntarily paid and accepted after maturity, on a promissory note stipulating for only six per cent., can not be recouped. *Snyder v. Braden*, 58 Ind. 143, overruled.

**MORTGAGE.**—*Foreclosure Against Subsequent Purchaser.—Evidence.*—In an action to foreclose a mortgage on real estate, against a subsequent purchaser, the evidence must show that the mortgage was recorded, or that the purchaser had notice thereof at the time of the purchase, or judgment of foreclosure is erroneous.

From the Wayne Superior Court.

*I. B. Morris*, for appellants.

*H. B. Payne*, for appellee.

**BIDDLE, J.**—Suit by the appellee against the appellants, to foreclose a mortgage.

Answer :

1. General denial ;
2. A special paragraph.

A third special paragraph was filed and stricken out by the court.

Trial by the court and finding for appellee.

Motion for a new trial overruled ; exceptions.

The appellant moved for judgment for costs on the pleadings. This motion was overruled, exceptions reserved, and judgment rendered. Appeal.

The appellants make the following points :

1. That the complaint is insufficient ; but they have not shown us wherein. It sets out the mortgage and the note, assigns breaches, and makes them exhibits. We can discover no material defect in the complaint.
2. That the court erred in compelling the appellants to

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*Hiatt et al. v. Renk.*

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go to trial before the case was put at issue. The general denial was in, and the appellants offered no evidence under the special paragraph of answer. This is shown by the evidence, which is all before us. But this irregularity, if it was an error, occurred at the trial, and should have been assigned as a cause for a new trial. It was not; the question is therefore waived. Busk. Prac. 124, 125, and the numerous authorities there cited.

3. That the court committed an error in overruling the appellants' motion for judgment in their favor, for costs, on the pleadings.

This point, it is claimed, was reserved by a bill of exceptions in the following words:

"The court called the cause for trial, and I. B. Morris, counsel for defendant W. J. Hiatt, stated that the cause was not at issue, and objected to trying the case until it was put at issue; that defendant Hiatt had filed two paragraphs of answer that had not been replied to. But the court overruled defendant's objection, because the cause had been called from day to day, and under a rule of court, when a cause is at issue, the parties are required to elect whether the cause will be tried by the court, and a jury trial waived; and, two or three days before, the parties announced that the case was at issue, and would be tried by the court, and it was set down by the court for the day on which it was tried; and, when the case was called, the counsel for defendant Hiatt announced that they had filed another paragraph of answer; the same, being done without leave of court or notice to plaintiff, was stricken from the files by order of the court, and proceeded to try the case. To which ruling of the court the counsel for the defendant, at the time, objected and excepted."

It seems to us, that, after the parties had announced that the case was at issue, two or three days before the day on which it was set down for trial, the appellant, who, in the mean time, had not asked for a reply to his answer, had

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Hiatt *et al.* v. Renk.

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no right to delay the trial when the case was called, for the purpose of requiring the appellee to reply. Such a practice would put it in the power of an attorney to very much embarrass the proceedings of a court. It appears to us, therefore, that the appellant, having stated two or three days before the case was set down for trial, that the case was at issue, must be held to have waived a reply to his answer, and be required to stand by the issue, as if his answer had been denied. Upon this basis, he had no right to any judgment in his favor on the pleadings. And, as the rejected paragraph has not been brought back into the record by a bill of exceptions, to inform us what it was, we must presume that the court rejected it properly.

4. That the damages are excessive.

The note stipulated for interest, at the rate of six per cent. A bill of exceptions informs us that the rate allowed by the court, accruing after the note became due, was ten per cent., which had been voluntarily paid and accepted. Section 5 of the amended act of 1861, 1 R. S. 1876, p. 600, prohibits the recoupment of any interest when it is voluntarily paid. By the act of 1867, 1 R. S. 1876, p. 599, it is declared, that all interest exceeding ten per cent. may be recouped, but does not repeal section 5, above cited, as to that part which prohibits any recoupment at all when voluntarily paid. In construing the two acts together—the latter not expressly repealing the former—it is plain that recoupment can not be allowed in any case except as to the excess of interest over the rate of ten per cent., when it is voluntarily paid and received. This is the construction of our interest laws as elaborated in the following cases: *Holcraft v. Mellott*, 57 Ind. 539; *Reynolds v. Roudabush*, 59 Ind. 488. The case of *Snyder v. Braden*, 58 Ind. 143, as far as it conflicts with this opinion and the cases above cited, is overruled. According to this view, the court did not err in allowing interest at the rate of ten per cent.,

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Goodwine v. Stephens.

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which accrued, and had been voluntarily paid and accepted, after the note became due.

But the judgment must be reversed. Hiatt purchased the mortgaged property after the mortgage had been executed. There was no evidence before the jury that the mortgage had ever been recorded, although the averments and exhibits show that it was regularly recorded; nor was there any evidence introduced tending to prove that Hiatt had any notice of the mortgage before he purchased the property. According to evidence in the record, Hiatt stands as an innocent purchaser for a valuable consideration, paid without either constructive or actual notice of the mortgage. This omission was, doubtless, an oversight, but it is nevertheless fatal to the case.

The judgment is reversed, at the costs of the appellee, cause remanded for further proceedings, according to this opinion.

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GOODWINE v. STEPHENS.

From the Fountain Circuit Court.

*G. McWilliams* and *J. Ristine*, for appellant.

*W. A. Tipton*, for appellee.

PERKINS, J.—This case presents the same questions for our decision that were presented and decided in the case of *Goodwine v. Stephens*, 68 Ind. 112, at this term.

For the reasons there given, this case is reversed.

Judgment reversed, with costs, and cause remanded, etc.

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GOODWINE v. STEPHENS.

From the Fountain Circuit Court.

*G. McWilliams* and *J. Ristine*, for appellant.

*W. A. Tipton*, for appellee.

PERKINS, J.—The questions for decision in this cause are the same as those presented and decided in the case of *Goodwine v. Stephens*, 68 Ind. 112, at this term.

For the reasons there given this case must be reversed.

Judgment reversed, with costs, and cause remanded, etc.

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The First National Bank of Vincennes v. Cockrum *et al.*

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GOODWINE v. MALBIE, BY HIS NEXT FRIEND.

From the Fountain Circuit Court.

*G. McWilliams* and *J. Ristine*, for appellant.

*W. A. Tipton*, for appellee.

PERKINS, J.—This case involves the same facts, and stands upon the same grounds, as the case of *Goodwine v. Stephens*, 68 Ind. 112, at this term; and upon the authority of that case the judgment herein is reversed.

Judgment reversed, with costs, and cause remanded for further proceedings.

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GOODWINE v. DUKES.

From the Fountain Circuit Court.

*G. McWilliams* and *J. Ristine*, for appellant.

*W. A. Tipton*, for appellee.

PERKINS, J.—The questions presented for decision in this case are similar to those presented and decided in the case of *Goodwine v. Stephens*, 68 Ind. 112, at this term.

For the reasons there given this case must be reversed.

The judgment is reversed, with costs, and cause remanded, etc.

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GOODWINE v. SEALS.

From the Fountain Circuit Court.

*G. McWilliams* and *J. Ristine*, for appellant.

*W. A. Tipton*, for appellee.

PERKINS, J.—This case presents the same questions as those decided in the case of *Goodwine v. Stephens*, 68 Ind. 112, at this term; and, for the reasons given in that case, the judgment below must be reversed.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

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THE FIRST NATIONAL BANK OF VINCENNES v. COCKRUM ET AL.

From the Gibson Circuit Court.

*W. H. DeWolf* and *S. N. Chambers*, for appellant.

*C. Denby*, *D. B. Kumler*, *W. M. Land*, *A. Iglehart*, *J. E. Iglehart* and *H. A. Yeager*, for appellees.

PERKINS, J.—The following is the assignment of error in this case: "The court below erred in sustaining the motion of appellees and quashing the execution mentioned in the record."

The question presented on this appeal is the same as that decided in the case of *The Vincennes National Bank v. Cockrum*, ante, p. 229, at the term of this court.

On the authority of that case the judgment is reversed, and the cause remanded.



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McKenny *et al.* v. Cockrum *et al.*

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THE VINCENNES NATIONAL BANK v. COCKRUM ET AL.

From the Gibson Circuit Court.

*F. W. Viehe* and *R. G. Evans*, for appellant.

*W. M. Land, C. Denby, D. B. Kumler, H. A. Yeager, A. Iglehart* and *J. E. Iglehart*, for appellees.

BIDDLE, J.—This case involves the same principle, and is between the same parties, as *The Vincennes National Bank v. Cockrum*, *ante*, p. 229, decided at the present term. By the authority of that case, the judgment in this case is reversed, cause remanded, with instructions to overrule the motion to quash the writ of execution, and to render judgment accordingly.

PETITION FOR A REHEARING.

BIDDLE, J.—The petition in this case is the same as that in case No. 6611, and is overruled for the same reasons.

NIBLACK, J., absent.

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THE VINCENNES NATIONAL BANK v. COCKRUM ET AL.

From the Gibson Circuit Court.

*F. W. Viehe* and *R. G. Evans*, for appellant.

*W. M. Land, C. Denby, D. B. Kumler, H. A. Yeager, A. Iglehart* and *J. E. Iglehart*, for appellees.

BIDDLE, J.—This case is between the same parties, and is in all respects the same, as *The Vincennes National Bank v. Cockrum*, *ante*, p. 229, decided at this term. By the authority of that case this judgment is reversed, at the costs of the appellees, cause remanded with instructions to overrule the motion to quash the writ of execution, and to render judgment accordingly.

PETITION FOR A REHEARING.

BIDDLE, J.—The petition in this case is the same as that in *The Vincennes National Bank v. Cockrum*, *ante*, p. 229, and for the same reasons is overruled.

NIBLACK, J., absent.

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McKENNY ET AL. v. COCKRUM ET AL.

From the Gibson Circuit Court.

*W. H. DeWolf* and *S. N. Chambers*, for appellants.

*W. M. Land, C. Denby, D. B. Kumler, H. A. Yeager, A. Iglehart* and *J. E. Iglehart*, for appellees.

PERKINS, J.—The following is the assignment of error in this case: "The court below erred in sustaining the motion of appellees and quashing the execution mentioned in the record."

The question presented on this appeal is the same as that decided in the case of *The Vincennes National Bank v. Cockrum*, *ante*, p. 229.

On the authority of that case, the judgment in this is reversed, with costs, and the cause remanded, etc.

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Stedman v. The State.

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THE OHIO AND MISSISSIPPI R. W. Co. v. HAY.

From the Scott Circuit Court.

*C. L. Jewett* and *S. S. Crowe*, for appellant.

PERKINS, J.—The appeal in this case presents the same question, and none other, that was decided in *The Ohio, etc., R. W. Co. v. Hardy*, ante, p. 454, at this term, and will be reversed, and ordered to be reinstated, for the reasons given in that case. Reversed, with costs, etc.

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CEDAR CREEK TOWNSHIP v. HUTCHINSON.

From the Allen Circuit Court.

*R. S. Taylor* and *S. L. Morris*, for appellant.

*J. M. Coombs*, *J. Morris* and *R. C. Bell*, for appellee.

Howe, C. J.—The first error assigned by the appellant on the record of this cause is as follows :

"1. The complaint does not state facts sufficient to constitute a cause of action."

And now comes the appellee, by Messrs. Coombs, Morris & Bell, his attorneys, and confesses that the foregoing error is well assigned, and that his complaint in this case does not state facts sufficient to constitute a cause of action.

The judgment is therefore reversed, at the appellee's costs, and the cause is remanded, with leave to the appellee to amend his complaint.

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INDIANAPOLIS, PERU AND CHICAGO R. W. Co. v. BEAM ET AL.

From the Marshall Circuit Court.

*D. Moss*, for appellant.

*W. B. Hess*, for appellee.

BIDDLE, J.—This case is between the same parties, and is the same in all respects, as *The Indianapolis, etc., R. W. Co. v. Beam*, 63 Ind. 490, decided at the present term.

Upon the authority of that case, this case is affirmed, at the costs of the appellant.

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STEDMAN v. THE STATE.

From the Marion Criminal Circuit Court.

*R. B. Duncan*, *C. W. Smith* and *J. S. Duncan*, for appellant.

*T. W. Woollen*, Attorney General, *J. B. Elam*, Prosecuting Attorney, *C. Baker*, *T. A. Hendricks*, *O. B. Hord* and *A. W. Hendricks*, for the State.

Howe, C. J.—The questions presented for decision in this case are substantially the same as those which were considered and decided by this court, in the case of *Fry v. The State*, 63 Ind. 552, at this term.

For the reasons given in the case cited, the judgment is affirmed in this case, at the appellant's costs.

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Swigart v. The State.

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JOYCE v. DICKEY.

From the Jefferson Circuit Court.

*E. R. Wilson*, for appellant.

*C. A. Korbly*, for appellee.

Howk, C. J.—The appellee having confessed the first and second errors assigned by the appellant in this court,—

Judgment reversed, at appellee's costs, and the cause is remanded, with instructions to sustain the appellant's demurrer to appellee's complaint, and for further proceedings.

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GAFF v. FITCH ET AL.

From the Dearborn Circuit Court.

*J. D. Haynes* and *J. K. Thompson*, for appellant.

*J. Schwartz*, for appellees.

PERKINS, J.—The question for decision in this case is the same as that presented and decided in the cases of *Wood v. Harrison*, 60 Ind. 480, *Burkham v. Fitch*, 51 Ind. 375, and *Gilbert v. The Southern Indiana Coal and Iron Co.*, 62 Ind. 522, at this term.

For the reasons there given this case is affirmed.

Judgment affirmed, with costs.

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OHM v. YUNG.

From the Vigo Circuit Court.

*W. E. Hendrick* and *J. G. Williams*, for appellant.

*T. W. Harper*, *J. M. Allen*, *W. Mack* and *S. B. Davis*, for appellee.

Howk, C. J.—The questions for decision in this case are substantially the same, though presented differently, as those which were considered and decided by this court, in the case of *Ohm v. Yung*, 63 Ind. 432, at the present term. For the reasons given in the case cited, this cause must be decided as that was decided.

The judgment is affirmed, at the appellant's costs.

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SWIGART v. THE STATE.

From the Henry Circuit Court.

*D. W. Chambers* and *F. W. Fitzhugh*, for appellant.

*T. W. Woollen*, Attorney General, and *J. M. Brown*, Prosecuting Attorney, for the State.

PERKINS, J.—This was an indictment against Swigart, charging the selling of a glass of beer to a minor.

The case falls directly within that of *Robinius v. The State*, 63 Ind. 235, at this term, on the authority of which the judgment in this case is reversed.

Reversed, with costs; cause remanded, etc.

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The State v. Pitzer.

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PEAK v. THE STATE.

From the Jackson Circuit Court.

*B. H. Burrell* and *F. Emerson*, for appellant.

*T. W. Woollen* Attorney General, and *J. B. Brown*, for the State.

WORDEN, J.—The appellant was indicted, tried and convicted, in the court below, of a rape upon the person of Emma Rigel, and sentenced to imprisonment in the state-prison for the period of two years.

The only question made here is whether the evidence was sufficient to sustain the verdict.

We have carefully read the evidence, and are of the opinion that it fairly sustains the verdict. The case is not one which calls for any interposition by this court.

The judgment below is affirmed, with costs.

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STEVENS v. WAGNER.

From the Ripley Circuit Court.

*S. M. Jones*, *H. W. Harrington* and *A. G. Howe*, for appellant.

*G. Durbin*, for appellee.

PERKINS, J.—The question in this cause is the same as that presented and passed upon in the case of *Stevens v. Burr*, 61 Ind. 464, decided at last term. For the reasons there given this cause is affirmed.

Judgment affirmed, with costs.

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TILLMAN v. CREAGER.

From the Wabash Circuit Court.

*M. H. Kidd*, *A. C. Downey* and *H. S. Downey*, for appellant.

HOWK, C. J.—It is conceded by appellant's counsel, that "the questions in this case are the same as those in *Tillman v. Kircher*," ante, p. 104.

Upon the authority of the case cited, the case now before us must be decided as that was decided.

Therefore the judgment is affirmed, at the appellant's costs.

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THE STATE v. PITZER.

From the LaPorte Circuit Court.

*G. Ford*, Prosecuting Attorney, and *T. W. Woollen*, Attorney General, for the State.

HOWK, C. J.—The questions presented for decision, in this case, are the same as those which were considered and decided by this court, at this term, in the case of *The State v. Pitzer*, 62 Ind. 862. For the reasons there given, this cause must be decided as that case was decided.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to overrule the appellee's motion to quash the indictment, and for further proceedings.

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Shaffrey v. The Workingmen's Savings, Loan and Building Association.

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**SHOEMAKER v. MORRISON ET AL.**

From the Clinton Circuit Court.

*A. E. Paige, S. O. Bayless and J. N. Sims*, for appellant.

*H. Y. Morrison, J. R. Brown, J. W. Morrison and J. U. Gorman*, for appellees.

BIDDLE, J.—Complaint by the appellees against the appellant, to collect an assessment for the construction of a drain. Trial, verdict and judgment for the appellees. Exceptions and appeal.

This case is the same in principle as the case of *Bate v. Sheets*, ante, p. 209, decided at the present term.

There is no averment showing, and no evidence in the case tending to prove, that the drain is conducive to public health, convenience or welfare, or of public benefit or utility, without which the appellees can not recover.

Upon the authority of the case cited, this judgment is reversed, at the appellees' costs; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings according to this opinion.

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**LAMB v. TRIPPET ET AL.**

From the Gibson Circuit Court.

*J. E. McCullough and W. M. Land*, for appellant.

*T. R. Paxton*, for appellees.

PERKINS, J.—This case presents the same questions for decision that were presented and decided in the case of *Jerauld v. Trippet*, 62 Ind. 122.

This was a suit for an injunction by Lamb, a surety for Lewis; and that was a suit for an injunction by Jerauld, a surety for Lewis, upon like facts.

For the reasons there given, this case is affirmed.

Judgment affirmed, with costs, as of the date of the submission.

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**SHAFFREY v. THE WORKINGMEN'S SAVINGS, LOAN AND BUILDING ASSOCIATION.**

From the Cass Circuit Court.

*S. T. McConnell*, for appellant.

*D. C. Justice and D. P. Baldwin*, for appellee.

HOWK, C. J.—The questions presented for decision by the record of this action, and the appellant's assignment of errors thereon, are substantially the same as those which were fully considered and finally decided by this court, in the case of *McLaughlin v. The Citizens Building, Loan and Savings Association*, 62 Ind. 284.

Upon the authority of that case, the judgment in this case is affirmed, at the appellant's costs.

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## CITIES AND TOWNS.

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*City of Logansport v. Crockett*, 319
2. *Same.—Resolution Fixing Salary.*—The yeas and nays must, in like manner, be taken and entered of record on the adoption of a resolution by the common council, fixing the salary of the city attorney *Ib.*
3. *Same.—Parol Evidence of Yeas and Nays.*—Parol evidence is inadmissible to prove the yeas and nays on the adoption of a resolution by the common council of a city, removing the city attorney; the record, or a duly authenticated copy thereof, being the only competent evidence of such fact. *Ib.*
4. *Same.—Omission of Yeas and Nays.—Nunc Pro Tunc Entry.*—Where the city clerk has failed to keep the record of the yeas and nays upon the adoption of a resolution by the common council, the proper remedy is for the common council to cause a *nunc pro tunc* entry of the yeas and nays to be made. *Ib.*

## CITY CLERK.

See CITIES AND TOWNS, 4.

## CIVIL LAW.

See JURY.

## COLLATERAL SECURITY.

See DECEDENTS' ESTATES, 12; PROMISSORY NOTE, 11, 12.

## COMMITTEE.

See JUDGMENT, 9.

## COMMON CARRIER.

See EVIDENCE, 3.

COMMON LAW.

See REPLEVIN BAIL, 2.

COMMON PLEAS COURT.

See PROSECUTING ATTORNEY, 8 ; REVIEW OF JUDGMENT, 3.

COMMON SCHOOLS.

1. *Cities, Towns and Townships.—School Corporation.*—By the law of this State on the subject of common schools, each civil township, and each incorporated town and city, are distinct school corporations, entitled to receive and expend their proper school funds independent of any control by any other such corporation. *Johnson v. School Trustees*, 275
2. *Town Incorporated within Township.—Custody of School Funds.*—A distinct portion of a certain township of this State having become an incorporated town, and elected school trustees, under the laws of this State, the trustee of such township, after the election but before such school trustees had qualified, demanded and received of the county treasurer the school funds of the whole township, whereupon such school trustees, after qualifying, demanded of him the payment to their treasurer of the proportion of such school funds belonging to such town, which he refused ; whereupon they filed an affidavit, reciting the foregoing facts, to compel him, by mandate, to pay over such moneys. *Held*, on demurrer, that they were entitled to recover. *Id.*

COMPROMISE.

See EVIDENCE, 4 ; INSTRUCTION, 3 to 6.

CONFESSION OF JUDGMENT.

See JUDGMENT, 3 to 5.

CONGRESS.

See CORPORATION, 2 to 4.

CONGRESSIONAL SURVEYS.

See CONVEYANCE, 1 ; WATERCOURSE, 1.

CONSPIRACY.

See CRIMINAL LAW, 36 to 47.

CONSTABLE.

See JUSTICE OF THE PEACE, 5.

CONSTITUTIONAL LAW.

See CORONER, 5 ; CORPORATION, 3 ; PROSECUTING ATTORNEY, 1, 2, 5.

CONSTRUCTION OF STATUTES.

See STATUTES CONSTRUED.

CONTEMPT.

See APPEAL BOND, 1 ; SUPREME COURT, 13.

CONTRACT.

- See CONVEYANCE, 3 ; CORONER, 1 to 3 ; CORPORATION, 11, 12 ; EVIDENCE, 1 ; DECEDENTS' ESTATES, 6 ; DITCHES AND DRAINS, 7 ; INSANE PERSON ; MALPRACTICE ; MARRIAGE CONTRACT ; MARRIED WOMAN ; NEGLIGENCE ; PARTNERSHIP ; PAUPER ; PROMISSORY NOTE, 16 ; REVIEW OF JUDGMENT, 2 ; TRESPASSING ANIMALS, 2.
1. *Agreement to Furnish Subscribers for Newspaper.—Evidence.—Failure of Consideration.*—In an action upon a contract wherein the defendants had agreed to furnish, within a certain period, a certain number of subscribers for a newspaper published by the plaintiff, or to pay him a

certain sum of money in lieu thereof, "in consideration" that such newspaper should "be conducted in the interest, and for the advocacy of" a certain political party, and in accordance with its platform of principles, the only evidence introduced was the written agreement and the testimony of a witness that such newspaper had been published as agreed upon, that no subscribers had been furnished within the period fixed, and that a certain part of such sum remained unpaid.

*Held*, that the evidence sustains a verdict for the plaintiff.

*Held*, also, that a failure to publish such newspaper in the interest of such party would constitute a failure of consideration, to be pleaded and proved by the defendants. *Moss v. Witness Printing Co.*, 125

2. *Same*.—*Instruction to Find for Plaintiff*.—*Interest*.—It was proper for the court to instruct the jury trying such cause to find a verdict for the plaintiff for the amount of such sum remaining unpaid, with interest thereon from the expiration of such period. *Ib.*

3. *Breach of Parol Contract*.—*Acceptance*.—*Pleading*.—*Fraud*.—In a complaint upon a parol contract for the manufacture of a certain quantity of brick, at a certain price, and for laying them in a wall, at a certain additional price, the plaintiff alleged the manufacture and delivery of the brick, and the refusal of the defendant either to pay for the same or to permit the plaintiff to lay them in such wall. The defendant filed a counter-claim, admitting the contract for manufacturing and averring that he had paid for the same in full, but alleging, that, though the plaintiff had contracted to manufacture a first-class article, he had in fact manufactured an inferior and useless article.

*Held*, on demurrer, that the counter-claim is insufficient.

*Held*, also, no fraud being alleged, that the defendant, by accepting the article, became bound for its reasonable value. *Hadley v. Prather*, 187

4. *Same*.—*Evidence*.—*Damages*.—Evidence showing the damages suffered by the plaintiff by reason of the alleged breach of contract is admissible under a general allegation in his complaint of damages. *Ib.*

5. *Subscription*.—*Indemnity*.—*Premium for Horse-Racing*.—*Complaint*.—*Capacity to Sue*.—*Parties*.—In an action against a subscriber, upon a written subscription of sums of money by the defendant and others severally, to a certain association, "for the purpose of assisting in the payment of premiums offered by the directors of" the association "for trotting, pacing and running races to be given" on the plaintiff's track, at a certain time and place, payable to the secretary thereof only in case "there should be a loss to said" association "on account of said races," the complaint alleged that the plaintiff was an association organized under the laws of this State, "for the purpose of purchasing grounds for a driving park \* for the improvement of horses in speed, style, action and blood," etc., and that there had been a loss to the plaintiff, on account of such races, of a sum exceeding the aggregate subscribed.

*Held*, on demurrer, that the complaint is sufficient, that the plaintiff had capacity to sue, and that the action can be maintained, not by the secretary, but only by the plaintiff. *Mullen v. Beech Grove Driving Park*, 202.

6. *Same*.—*Voluntary Association*.—Such an association may properly be organized under section 2 of the act authorizing voluntary associations, 1 R. S. 1876, p. 923. *Ib.*

7. *Same*.—*Consideration*.—*Corporate Existence*.—*Estoppel*.—Such subscription was based upon a sufficient consideration, and estopped the defendant from denying the corporate existence of the plaintiff. *Ib.*

8. *Same*.—*Recording Articles of Association*.—By his subscription the defendant admitted that the plaintiff's articles of association had been duly recorded, and is estopped from denying such fact by answer. *Ib.*

9. *Same*.—*Ultra Vires*.—*Gaming*.—*Pool-Selling*.—An answer admitting the subscription sued upon, but alleging that the plaintiff was organized for

an unlawful purpose, viz., the purchase of grounds for horse-racing "and other purposes," or to enable the plaintiff to sell "pools" upon horse-races, is insufficient. *Ib.*

10. *Same.—Fraud.—Negligence.*—An answer admitting the execution of the subscription sued upon, but alleging that the person procuring his signature had misrepresented the contents of the subscription and the extent of liability the defendant would incur by signing it, is insufficient. *Ib.*
11. *Agreement with Debtor to Take his Property and Pay his Debts.*—A creditor may maintain an action upon a promise, by the defendant to the debtor, to pay all of the debts of the latter in consideration of property sold and delivered by the debtor to the defendant. *Loeb v. Weis*, 285
12. *Same.—Answer.—Argumentative Denial.*—The defendant in such an action answered that he had received the debtor's property, and was to apply the proceeds to the payment, first, of certain specified debts, and then to the payment of debts due the plaintiff and others; that he had realized from such property its fair value and applied the proceeds to the payment of the debts specified, and that nothing remained to apply on the plaintiff's debt.

*Held*, on demurrer, that, though amounting only to an argumentative denial, the answer is sufficient. *Ib.*

13. *Dissolution of Copartnership.—Agreement to Pay Partnership Indebtedness.—Action for Breach of.*—A member of a partnership who has sold and delivered to his copartners his interest in the partnership property and chases in action, in consideration of their payment to him of a stipulated sum and their agreement to pay off the partnership indebtedness, may, if he be compelled to pay off any of such indebtedness, recover the same of them. *Vanness v. Dubois*, 383

14. *Same.—Statute of Frauds.—Consideration.*—Such an agreement is not within the statute of frauds, and is upon a valuable consideration. *Ib.*

15. *Verbal Contract to Convey or Devise Lands.—Statute of Frauds.—Lost or Destroyed Will.—Evidence of.—Partition.*—In an action for partition of the lands of an intestate, a defendant answered claiming title to the whole of the lands by virtue of the performance of a verbal contract made between such intestate and the defendant, whereby the former put the latter in possession of the lands, and agreed to convey or devise the same to him; in consideration of the promise of the latter to board and care for the former during life.

*Held*, that such contract is not within the statute of frauds.

*Held*, also, that evidence of a will prepared by the intestate, devising part only of such lands to the defendant, spoken of by the witnesses as lost or destroyed, and the existence of which at and since the intestate's decease was unknown, was incompetent and immaterial. *Mauck v. Melton*, 414

#### CONVERSION.

See GUARDIAN AND WARD, I to 6.

#### CONVEYANCE.

See CONTRACT, 15; DECEDENTS' ESTATES, 6; DESCENTS, 5; FIXTURE; INFANT, 1, 2; MISTAKE; MORTGAGE, 9.

1. *Description.—Mistake.—Reforming Deed.*—A conveyance of a certain tract of land described the same as "The south-west fraction of section 17, town 22, range 6 west," in Warren county, Indiana, "except 20 acres off of west side of above described south-west quarter" section;—such section being a portion of the public lands surveyed, platted and sold by the United States, and being so traversed by the Wabash river, in a south-westerly direction, as to cut off an irregularly shaped portion of

- the south-east corner of the south-west quarter thereof, as shown by the plat of the Government survey.
- Held*, in an action by one claiming under such deed against the heirs of the grantor, to reform the description in such deed and to recover possession, that such description is sufficient without reformation.
- Held*, also, that the Supreme Court takes judicial notice of the location of the counties of this State, and that the description "Town 22" in such deed is equivalent to "Town 22 North." *Dawson v. James*, 162
2. *Defective Description.—Void Sheriff's Deed.—Reformation of.*—A sheriff's deed of conveyance of real estate, founded upon a sheriff's sale of the same on a decree of foreclosure of a mortgage, describing the premises as "part of lot No.," etc., is void for uncertainty, and can not be reformed. *Lewis v. Owen*, 446
  3. *Deed Intended as Mortgage.—Sale by Mortgagee.—Complaint by Mortgagee's Widow for Partition and to Quiet Title.*—In an action to partition and quiet title to lands of an intestate, brought by the widow against the heirs and A. and B., the complaint alleged, that the intestate died seized of the lands in fee-simple, and that the widow and heirs had been continuously in possession thereof since his death, except during a period when they were absent from the State; that, in the lifetime of her husband, and contemporaneous with his enlistment in the army, she joined with her husband in a warranty deed of conveyance of the lands to A., to secure the payment of a debt of one hundred dollars, which A. falsely represented to her was owing to him from the husband, and to secure certain sums of money which A. was to pay on other debts, which he falsely represented to her were owing from her husband to third persons; that A., at the time, verbally promised them to reconvey the lands on request, upon payment to him of the sums thus secured; that, within a few days after the death of the husband, A. conveyed the lands to B. for three thousand dollars, being the actual value thereof at the time of such conveyances; that B. had paid to A. eight hundred dollars of the purchase-money, and the residue remained yet due; that certain Missouri lands which A. proposed to convey to her husband "were wholly worthless for any purpose;" and that the lands when conveyed to A. were subject to a certain mortgage which remains unpaid.  
*Held*, on demurrer by A. and B., that the complaint is sufficient. *Cravens v. Kitta*, 581
  4. *Same.—Answer of Failure to Tender Reconveyance.*—A. answered such complaint, alleging that part of the consideration for the conveyance to him was a title bond, executed by him to the husband, "to certain real estate in Missouri;" that afterward, on the request of the husband, he conveyed such lands to a son of the latter; and that no reconveyance had been tendered.  
*Held*, on demurrer, that the answer is insufficient. *Id.*
  5. *Same.—Estoppel.—Declaration to Purchaser by Mortgagee in Possession.—Notice.*—B. answered such complaint, alleging that, prior to his purchase of the lands, he caused inquiry to be made of the decedent in his lifetime, "as to what interest he had in the" lands, to which he replied that he was "in possession merely as" A.'s tenant; and B. alleged that thereupon he purchased the lands, relying upon such statement, without notice of the fraudulent representations and for value.  
*Held*, on demurrer, that the answer is insufficient. *Id.*
  6. *Same.—Widow.—Witness.*—The widow is an incompetent witness, in such an action, as to any matter relating to the alleged agreement to reconvey. *Id.*

## COPY.

See DECEDENTS' ESTATES, 1, 2, 6; GUARDIAN AND WARD, 5; NEGLIGENCE;  
 PLEADING, 3; WILL, 2.

## CORONER.

1. *Inquest.—Employment of Physician.—Liability of County.*—The coroner of a county, in holding an inquest upon the body of a human being found within his county, and supposed to have come to death by casualty or violence, has the right to employ such medical or surgical skill as in his judgment may be necessary, and to charge his county with the payment of the reasonable value thereof; and, in so doing, he is not limited to the employment of persons residing within the county.  
*Jameson v. Board of Comm'rs, etc., 524*
2. *Same.—Coroner to Certify, and Commissioners to Order Payment.*—Where such services have been rendered at the request of the coroner, it is his duty to certify the facts to the board of commissioners, whose duty it is to order payment therefor, at their reasonable value, out of the county treasury. *Ib.*
3. *Same.—Coroner's Contract.—Measure of Damages.*—The fact that the coroner, in requesting such services, stipulates the amount to be paid therefor, is not binding, as the value of the services must be determined as is any other unliquidated claim against the county. *Ib.*
4. *Same.—Appeal, or Original Action, on Disallowance.—Former Adjudication.*—Upon the total disallowance of such a claim, by the board of commissioners, the claimant may, at his option, either appeal, or bring an original suit for the value of his services; and such disallowance will not support or authorize a plea of former adjudication, as the determination of such claim by the board is not final. *Ib.*
5. *Same.—Constitutional Law.—Title of Act.*—The subject-matter of section 10 of the act authorizing and limiting allowances, 1 R. S. 1876, p. 68, is properly embraced within the title of that act. *Ib.*
6. *Same.—Chemical Analysis Outside of County.*—The fact that the claimant, at the request of the coroner, after a *post mortem* examination of the body of a deceased person, supposed to have died by poison, took the stomach out of the county to make a chemical analysis of its contents, is no defence to an action against the county, for such services. *Ib.*
7. *Same.—Motive Instigating Inquest.—Notice.*—The fact that such inquest was instigated by a third person, from interested motives, and should not have been held, constitutes no defence to such action, unless it is also alleged that the claimant had notice of such facts, before performing the services. *Ib.*
8. *Same.—Person Dying in One, Buried in Another, County.—What Coroner to hold Inquest, after Burial.*—Where, after burial, an inquest becomes necessary to determine the manner of the death of a person who, dying in one county, is buried in another, the coroner of the latter county is the proper officer to hold the inquest. *Ib.*

## CORPORATION.

See CONTRACT, 6 to 9; PROMISSORY NOTE, 17; REPLEVIN; WILL, 8.

1. *"Foreign Corporation" Defined.*—The statutes of this State define a foreign corporation to be "a corporation created by or under the laws of any other state, government or country," or one "not incorporated or organized in this State." *Daly v. The Nat'l Life Ins. Co., etc., 1*
2. *Same.—Insurance Company Created by Act of Congress.*—An insurance company created by an act of Congress is a foreign corporation subject to the requirements of the statute of this State approved June 17th. 1862, "respecting foreign corporations and their agents in this State," 1 R. S. 1876, p. 873. *Ib.*
3. *Same.—Congress as a Local Legislature.—Constitutional Law.*—An act of Congress creating a private corporation is the act of Congress as the

local Legislature of the District of Columbia ; as Congress can not, under the Federal constitution, as the Congress of the United States, create a private corporation. *Ib.*

4. *Same.—Act Regulating Foreign Insurance Companies.—Repeal of Statute.*—The act of December 21st, 1865, "regulating foreign insurance companies," etc., 1 R. S. 1876, p. 594, applies to insurance companies "incorporated by any other State than the State of Indiana" and those "incorporated by any government foreign to the United States," but not to those created by Congress ; and, as to the latter class of companies, such act does not repeal said act of June 17th, 1852. *Ib.*
5. *Same.—Loaning Money.*—Said act of December 21st, 1865, does not so apply to foreign insurance companies, as to enable them to loan money, through their agents, in this State, without complying with the provisions of said act of June 17th, 1852. *Ib.*
6. *Same.—Foreclosure of Mortgage.—Failure to Comply with Act Concerning Foreign Corporations and Agents.*—In an action by an insurance company created by an act of Congress, to foreclose a mortgage on lands in this State, executed by a husband and wife to secure the payment of a loan made to the husband by the plaintiff through its local agent in this State, and to recover the mortgage debt, it is a good answer, as a plea in abatement, to allege the failure of the plaintiff and its agent to comply with the requirements of said act of June 17th, 1852. *Ib.*
7. *Same.—Effect of such Failure.*—Such failure does not render the mortgage void, but merely suspends the right to foreclose it until the provisions of such act shall have been complied with. *Ib.*
8. *Same.—Loan by Insurance Company.—Charter.—Ultra Vires.*—A section of the charter of such insurance company, authorizing it to invest its capital, etc., in "bonds, and mortgages on unencumbered real estate," sufficiently authorized the taking of the mortgage in suit. *Ib.*
9. *Same.—Husband and Wife.—Quieting Title.*—A failure to comply with the requirements of said act of June 17th, 1852, is not sufficient ground to sustain a cross complaint by the wife, the owner of the mortgaged premises, to have the mortgage declared null and void and to quiet her title against it. *Ib.*
10. *Same.—Set-Off.*—A cross complaint in the nature of a set-off, for moneys alleged to be due and owing from such plaintiff to the husband, may properly be pleaded in such action. *Ib.*
11. *Insolvent Corporation.—Distribution of Assets.—Purchase of Stock, and Assumption of Debts of.—Novation.—Payment.—Promissory Note.*—In an action against an insolvent incorporated stock company, its duly appointed receiver and A, to recover for money expended by the plaintiff for the use of the company, the court found, specially, that the capital stock of the corporation had once been owned, severally, by A., B., C., D. and the plaintiff, who were also directors of the company ; that the corporation was then indebted to B., C. and the plaintiff, severally, in certain sums of money expended for its use, evidenced by its promissory notes ; that thereupon the stockholders entered into an agreement that B., C., D. and the plaintiff should transfer their stock, and surrender such promissory notes, to A., who was to assume the payment of the same individually, and to execute his promissory notes to the retiring stockholders, severally, for the price of the stock sold by, and the debt due to, each ; that this agreement had been duly executed, but that the corporation had never assented thereto ; that there was no agreement that A.'s individual notes should be accepted in payment of the company's notes ; that A., to secure the notes so executed by him, had executed a mortgage to the retiring partners, upon the property of the corporation ; that the corporation was then largely indebted to

other creditors; and that A.'s notes remained unpaid, and he had become insolvent.

*Held*, as a conclusion of law, that the plaintiff was entitled to share, *pro rata*, with the other general creditors of the corporation, for the money so paid by him for the use of the corporation, but that the debt for the stock sold was payable only from the surplus, if any, after the payment of the general debts.

*Held*, also, that, because of the failure of the corporation to assent to such agreement, there was no novation.

*Held*, also, that such debt was not paid by such exchange of notes.

*Bristol, etc., Co. v. Probasco*, 406

12. *Foreign Corporations and their Agents.—Promissory Note.—Abatement of Action.*—In an action by a foreign corporation, as payee, against the maker, on a promissory note executed pursuant to a contract entered into, in this State, between the defendant and an agent of the payee, as such, the defendant answered, alleging, in effect, that, *at and prior to* the execution of the note, such agent had failed to comply with the requirements of sections 1 and 2 of the "act respecting foreign corporations and their agents in this State." 1 R. S. 1876, p. 878.

*Held*, on demurrer, that, for want of an allegation that the requirements of such sections had not been complied with *at or prior to* the commencement of the action, the answer is insufficient.

*Held*, also, that the effect of such non-compliance is, not to render the contract void, but to prevent its enforcement until compliance.

*Singer Mfg. Co. v. Brown*, 548

## CORRESPONDENCE.

See WARRANTY, 2.

## COSTS.

See INJUNCTION.

*Renewal of Action Voluntarily Dismissed.—Order Staying Proceedings until Costs are Paid.—Mandamus.—Presumption.*—A plaintiff who had voluntarily dismissed his action, and withdrawn his complaint, immediately refiled the same complaint, whereupon the court, upon being satisfied that the costs of the first action had not been paid, and that the plaintiff was insolvent, ordered that the proceedings in the second action should be stayed until such costs had been paid.

*Held*, in a proceeding to compel the judge of such court, by mandate, to proceed with the trial of such action, that the order staying proceedings was proper.

*Held*, also, the contrary not being shown, that it is presumed that the second action was vexatiously brought.

*The State, ex rel., v. Howe*, 18

## COUNTER-CLAIM.

See DECEDENTS' ESTATES, 5; PLEADING, 1; TRUSTS, 1.

## COUNTY.

See CORONER; PAUPER; TAX TITLE, 3.

## COUNTY COMMISSIONERS.

See CORONER, 2 to 5; PAUPER.

## CRIMINAL COURT.

See PROSECUTING ATTORNEY, 1 to 4.

## CRIMINAL LAW.

See HABEAS CORPUS; PROSECUTING ATTORNEY, 4.

1. *Robbery.—Constructive Violence.*—Though the distinguishing feature of robbery is violence, yet robbery may be committed without actual vio-



lence, as by exciting fear in the person robbed, which, in law, constitutes constructive violence. *Shinn v. The State*, 13

2. *Same.*—The violence necessary to constitute robbery must be more than a sudden taking or snatching of the property, and must precede or accompany the taking. *Ib.*
3. *Same.*—*Fraud.*—*Trick.*—The fraudulent and felonious taking of property by means of a trick or contrivance, but unaccompanied by violence, does not constitute robbery. *Ib.*
4. *Arrest of Judgment.*—*Causes for.*—A motion in arrest of judgment lies only for two causes, viz.: 1. That the grand jury had no legal authority to present the indictment, for want of jurisdiction in the court; and, 2. That the facts stated do not constitute a public offence. *Shepherd v. The State*, 43
5. *New Trial.*—*Misconduct of Counsel.*—*Reference to Former Trial.*—*Evidence.*—A statement, that, on a former trial, the defendant had been convicted, made in the hearing of the jury, by the prosecuting attorney, to opposing counsel, in reply to a remark by the latter calculated to elicit such remark, and remarks of the same character, made by a witness in the course of his examination, in fixing certain dates, are not sufficient causes for reversing the judgment. *Ib.*
6. *Murder.*—*Verdict upon Circumstantial Evidence.*—*Supreme Court.*—Where a murder has been committed, and, after a fair trial, on a sufficient indictment, under a proper presentation of the law by the court, and upon a chain of evidence which, though wholly circumstantial, clearly points to the defendant as the murderer, the jury trying the cause find the defendant guilty as charged in the indictment and affix a lawful penalty, the Supreme Court will not disturb the verdict. *Ib.*
7. *Same.*—*Murder.*—*Reputation of Defendant for Peaceableness.*—*Cross-Examination.*—On the trial of a defendant indicted for murder, wherein a witness had testified on behalf of the defendant, that he was a peaceable man, the counsel for the State, on cross-examination, asked the witness whether there was any difference between the defendant's disposition when intoxicated and when sober, to which the answer was that he was peaceable when intoxicated.  
*Held*, that the question and answer, taken together, were harmless. *Achey v. The State*, 56
8. *Same.*—*Instruction.*—*Statute Defining Murder.*—An instruction to the jury in such case, reciting section 2 of the act defining felonies, 2 R. S. 1876, p. 423, being the statutory definition of murder in the first degree, and declaring the penalty therefor to be death, is correct as far as it goes, and is not erroneous as an independent instruction. *Ib.*
9. *Same.*—*Additional Instruction.*—The giving of an additional instruction, referring to such previous instruction, and reciting section 4 of such act, giving the jury the power to fix the penalty at imprisonment in the state-prison for life, in effect constituted both one proper instruction. *Ib.*
10. *Same.*—*Malice.*—*Reasonable Doubt.*—*Provocation.*—*Consequences of Act.* For instructions given at length and commended, see opinion. *Ib.*
11. *New Trial.*—*Misconduct of Juror.*—*Affidavit.*—An affidavit in support of a motion for a new trial on the ground of misconduct of a juror should clearly identify the juror guilty of the alleged misconduct, and should clearly specify the facts alleged to constitute misconduct. *Ib.*
12. *Same.*—*Juror's Expression of Opinion.*—Affidavits charging that one of the jurors, prior to the empanelling of the jury, had expressed an opinion that the defendant was guilty and should be hung, should unequivocally allege that the defendant and his counsel were ignorant of that fact prior to the empanelling of the jury. *Ib.*

13. *Same.—Weight of Evidence.—Supreme Court.*—Where such motion, both supported and resisted by affidavits, has been denied by the court, the Supreme Court will not disturb such decision on the mere weight of the evidence afforded by such affidavits. *Ib.*
14. *Larceny.—Indictment.*—An indictment for larceny must, to be sufficient, charge the defendant with having feloniously taken, stolen and carried away the property alleged to have been stolen. *Gregg v. The State, 228*
15. *Injuring Toll-Gate.—Affidavit.—Malice.—Mischief.*—In a prosecution, under section 66 of the act defining misdemeanors, 2 R. S. 1878, p. 479, for injuring a toll-gate, the affidavit, information or indictment need not allege either a malicious purpose or mischievous intent on the part of the defendant. *The State v. Walters, 226*
16. *Mayor of City.—Authentication of Transcript.—Seal.—Justice of Peace.*—When a criminal prosecution is instituted before the mayor of a city of this State, he acts in the capacity of a justice of the peace only; and a certified transcript of such cause, on either a change of venue from him or an appeal to the circuit court, need not bear the corporate seal of the city. *Ib.*
17. *Supreme Court.—Transcript Filed too Late.—Appearance.—Waiver.*—The transcript on an appeal to the Supreme Court having been filed more than thirty days after the appeal was taken, the appellee moved for a dismissal of the cause on that ground, but, without awaiting a decision of his motion, joined issue on the assignment of errors and submitted the cause.  
*Held, that his motion and right to a dismissal were waived. Ib.*
18. *Evidence.—Time.*—Evidence which, though silent as to the year, fixes the time of the commission of an alleged offence on the day and month specified in the affidavit, information or indictment, is sufficient as to the time. *Greenwood v. The State, 250*
19. *Assault and Battery.—Former Conviction.—Riot.*—A valid conviction of a defendant for an assault and battery upon one person is no bar to a prosecution for an assault and battery committed by the defendant upon another person, at the same time and place, during the continuance of a fight in which the defendant and others had engaged. *Ib.*
20. *Weight of Evidence.*—The Supreme Court, on appeal, will not disturb a verdict on the mere weight of the evidence. *Kelly v. The State, 326*
21. *Indictment.—Assault with Intent to Murder.*—An indictment charged that, on, etc., at, etc., the defendant "did feloniously attempt to commit a violent injury upon" a person named, the defendant "having then and there a present ability" so to do, "by then and there feloniously, purposely and with premeditated malice shooting at and against" such person, with a pistol loaded with gunpowder and leaden balls and then and there in the defendant's hands, "with intent then and there and thereby" such person "feloniously, purposely and with premeditated malice to kill and murder."  
*Held, that the indictment is sufficient. Agee v. The State, 840*
22. *Same.—Resisting Arrest on Warrant for Bastardy.—Self-Defence.—Assisting Officer.*—On the trial of the defendant, on such indictment, the evidence of the State was, in effect, that the defendant, in avoiding an arrest for bastardy upon a warrant which he knew was in the hands of the prosecuting witness, who was authorized by the officer to make the arrest, threatened to and did shoot at such witness with a loaded pistol, and there was also evidence tending to show an exchange of shots after the first fire; and the defendant's evidence was, substantially, that he had no knowledge that the prosecuting witness had the warrant, or any authority to arrest him, and knew he was not an officer, that the defendant shot at the prosecuting witness only upon the latter's presenting a

- loaded pistol and threatening to kill him, that there was an exchange of shots, and that he did not intend to kill the prosecuting witness, but shot merely in self-defence.
- The defendant asked the court to give to the jury certain instructions relating to the right of self-defence, and denying the right of an officer to kill a person who is fleeing from arrest upon such a warrant.
- Held*, the instructions (which are set out in the opinion in full) properly stating the law, that they ought to have been given. *Ib.*
23. *Blackmail.—Punishment for One Crime on Proof of Another.*—On the trial of an indictment charging the defendant with having threatened to accuse the prosecuting witness of the seduction of a woman whom the defendant himself had seduced, as the State claimed, the court instructed the jury, that, if they found the defendant guilty of blackmail, they might, "as bearing on the question of punishment," consider the facts in relation to the seduction by the defendant.
- Held*, that the instruction was erroneous. *Kistler v. The State*, 371
24. *Cause Stricken from Docket.—Nolle Prosequi.*—Where, by leave of court and in the absence of the defendant, a criminal prosecution is unconditionally and absolutely stricken from the docket, on the motion of the prosecuting attorney, it can not be reinstated, over the objection of the defendant, the effect of such action being that of a *nolle prosequi*. *Ib.*
25. *Impeaching Witness.*—Where, on the cross-examination of a witness for the State, he denies having made a certain statement indicating hostility toward the defendant, he may be contradicted. *Scott v. The State*, 400
26. *Instruction Assuming Fact.*—The assumption by the court, in its instructions to the jury, of the existence of a fact in dispute on the trial, is erroneous. *Ib.*
27. *Voluntary Intoxication.*—Mental incapacity, produced by voluntary intoxication, existing only temporarily, is no defence to a prosecution for a crime committed by a person while he is so intoxicated and mentally incapable. *Fisher v. The State*, 435
28. *Same.—Insanity Produced by Disease Resulting from Habitual Intoxication.*—Insanity resulting from the habit of intoxication which, though voluntary, has been long continued, and has produced disease which has so perverted or destroyed the mental faculties as to render the person so afflicted incapable, by reason of such disease, of acting from motive, or of distinguishing right from wrong when sober, is a defence to a prosecution for a crime committed by him while in such condition. *Ib.*
29. *Same.—Weight of Evidence.—Supreme Court.*—The Supreme Court, on appeal, will not disturb a verdict against the defendant in such case, on the mere weight of conflicting evidence as to his mental condition. *Ib.*
30. *Newly-Discovered Evidence.—New Trial.*—Newly-discovered evidence is not sufficient ground for a new trial, unless it comes within the rule laid down in clause 7 of section 352, p. 181, and in section 142, p. 409, 2 R. S. 1876. *Ib.*
31. *Arrest of Judgment.*—The judgment in a criminal prosecution may be arrested for either of the causes stated in section 144, 2 R. S. 1876, p. 409. *Ib.*
32. *Forgery.—Indictment.*—An indictment for the forgery of a promissory note payable to and endorsed by one "E. J. Schweitzer," as appeared by copies of the note and endorsement set out in the indictment, alleged that the forgery was committed by the defendant "with intent to defraud one Emily J. Schweitzer."
- Held*, that the indictment is insufficient. *Yount v. The State*, 443
33. *Same.—Verdict.—Acquittal.*—A verdict of guilty as charged in one of the counts of an indictment, alleging, respectively, the forgery of a

promissory note, and the utterance of the same, is equivalent to an acquittal on the other count. *Ib.*

34. *Murder.—Evidence.—Previous Assault.—Cautiousness of Deceased.—Motive.—Opportunity.*—On the separate trial of a defendant, who was indicted jointly with A., B., C. and D., for the murder of one toward whom all but D. harbored ill-will engendered by adverse interests in a certain estate, wherein it appeared by the evidence that the deceased was murdered, of an evening, while entering his residence, which was in town, and that, long previous thereto, but after such ill-will had arisen and while the deceased was living elsewhere, he had been seriously injured by missiles exploded in his house by the defendant, it was competent to prove, that, during all of the time elapsing between such explosion and the murder, except on the evening of the murder, the deceased had always entered his residence before dark, and that he and his family never ventured out of the house after dark, but fastened the doors, and slept upstairs. *Jones v. The State, 473*
35. *Same.—Threats Towards Deceased's Family, and Proposition of Compromise, after Murder.—Malice.*—It was competent, on such trial, as tending to show malice, to prove, that, after the murder, the defendant proposed that the family of the deceased, if they would make a certain compromise in relation to such estate, might return to their former home unmolested, and vaguely threatening them if they did not comply. *Ib.*
36. *Same.—Declarations of Accomplice.—Conspiracy.*—D. having pleaded guilty as charged in the indictment, and having testified, that, pursuant to a common purpose to commit the murder, means similar to those used in committing the murder were prepared by the others, in the absence of C., on the day it was committed, that the defendant had threatened to kill the deceased, and had tried to induce the witness to do the killing, and that A. and B., having left C., D. and the defendant, with the understanding that they two were to kill the deceased, had returned declaring that they had done so, it was competent to give in evidence a conversation had between the witness and C., after such preparations and before the murder, and in the absence of the defendant, relative to the proposed murder. *Ib.*
37. *Same.—Conduct of Defendant Toward Witness, after Murder.—Impeachment of Witness.—Evidence.*—The conduct of the defendant, after the murder, in causing the arrest of the witness, D., for another crime, his explanation thereof to D., and his furnishing the latter with money to leave the State, was competent, on his re-examination, to explain the relations existing between the witness and the defendant. *Ib.*
38. *Same.—Intimidation of Witness.*—It having been developed on the examination of a witness for the State, that her testimony on the preliminary examination contradicted her present testimony, it was competent to prove, by her, threats made by the defendant to be, and which were, communicated to her by D., prior to her former testimony. *Ib.*
39. *Same.—Weapon Carried by Defendant to Intimidate.*—Such witness having testified that the defendant, on informing her that she was to be indicted for perjury, had declared to her, on her proposing to him to confess the perjury, that "he had a revolver in his boot for all who went back on him," it was competent to prove, that, on the day of his arrest, he was armed as he had so declared. *Ib.*
40. *Same.—Declarations of Accomplice.—Conspiracy.*—Declarations by B., made while armed and in company with the defendant, and during the pendency of a lawsuit in regard to such estate, which indicated a lying in wait for the deceased, were competent evidence, as tending to establish the conspiracy testified to by D. *Ib.*
41. *Same.—Transcript of Record.—Harmless Evidence.*—The transcript of the

- record of such cause, made on a change of the venue thereof, though incompetent, was harmless evidence. *Ib.*
42. *Same.—Threats and Admissions of Third Person.*—Threats made by a third person to kill the deceased, and admissions by him that he had procured D. to commit the murder, were not competent evidence for the defence. *Ib.*
43. *Same. - Res Gestæ.*—Declarations by a third person, accompanying acts tending to show that he, and not the defendant, had committed the murder, would be competent evidence for the latter. *Ib.*
44. *Same.—Intimidation of Witness by Other Witnesses.—Impeachment of Witness.*—It is incompetent for a witness for the defendant to state what means, if any, had been used by witnesses for the State to prevent him from testifying, where no ground for their impeachment has been laid. *Ib.*
45. *Same.—Instruction to Jury.—Matters of Fact.*—It is proper to refuse to give an instruction which embraces a theory of defence founded on matter of fact solely, without any statement of the rules of law applicable thereto. *Ib.*
46. *Same.—Failure of the Theory of the State.*—Where the evidence of crime is largely circumstantial, as against the defendant, some of it tending to sustain the theory advocated by the State, and some a different theory, but each theory tending to implicate the defendant, it is proper to refuse to instruct the jury, that, if they have a reasonable doubt of the truth of the State's theory, the defendant should be acquitted. *Ib.*
47. *Same.—Crime Procured by Conspirators.—Alibi.*—It appearing from the evidence in such case that the murder had been committed pursuant to a conspiracy so to do by the parties indicted, though possibly by the hand of some one not a party to the conspiracy, it was proper to instruct the jury that the defendant and his "confederates" (those indicted with him), though not present at the murder, might yet be guilty as conspirators. *Ib.*
48. *Same.—Credibility of Accomplice as a Witness.*—It was proper to refuse to instruct the jury, in relation to the credibility of a confessed accomplice who had testified, that formerly, under the law as it then was, he would not have been allowed to testify. *Ib.*
49. *Same.—Credibility of Witness Admitting Former Perjury.*—It is proper to refuse to instruct the jury, in relation to the testimony of a witness who has confessed to having testified falsely on a former trial, that the jury should reject such testimony if, on the explanation of the witness that she had testified falsely, because of fear inspired in her by threats, made by the defendant, it does not seem to the jury reasonable, that fear could have been inspired by such threats. *Ib.*
50. *Same.—Opinion of Judge.—Capital Punishment.*—A defendant, on trial for murder, can not complain of an instruction which indicates that the court is opposed to capital punishment. *Ib.*
51. *Harmless Refusal.*—Where the substance of an instruction asked is embraced in one given, the refusal is harmless. *Ib.*
52. *Verdict.—Acquittal.* A verdict of guilty as charged in one only of several counts in an indictment is, in effect, an acquittal on the other counts. *Bonnell v. The State, 498*
53. *False Pretences.—Indictment.—False Report by Employee to Employer. Personating Fictitious Person.*—An indictment against the "foreman of a gang of hands" laboring for the receiver of a railroad company charged the defendant with having made a false report, in writing, that a certain fictitious person was entitled to a certain sum for labor performed for the receiver as one of such "gang," and with having procured another to per-

sonate such fictitious person and receive from the paymaster of the receiver, of the moneys of the receiver, the amount due to such fictitious person as shown by the pay-roll, which was founded upon, and made out pursuant to, and upon the faith of, such false report, with felonious intent to defraud, etc.

*Held*, that such an indictment is fatally defective for want of an averment that it was the duty of defendant to employ such laborers for the receiver, and that such duty was known to the persons to whom he reported, and to those whose duty it was to prepare the pay-roll.

*Held*, also, that a payment, by the paymaster, to him personating such fictitious person, without indentification, was negligence with which the receiver was chargeable. *Ib.*

54. *False Pretences in Obtaining Check.—Description of Check in Indictment.*—An indictment for obtaining a check calling for the payment of money, by means of false pretences, should describe the check by setting out its substance, at least, or allege a substantial reason for the failure to do so. *Ib.*

55. *Professional Gambler.—Affidavit.—Evidence.*—In a prosecution before the mayor of a city, under section 8 of the act of March 15th, 1877, Acts 1877, Spec. Sess., p. 80, which section defines a professional gambler, the affidavit alleged, that, at, etc., on a certain day, "and at divers times" thereafter, the defendant did "then and there unlawfully frequent, for the purpose of gaming with cards, a certain place in said county where gambling was then permitted, to wit, a certain room then and there occupied by one" S. S., etc.

*Held*, that the affidavit is sufficient.

*Held*, also, that it is not necessary to aver or prove that the defendant actually engaged in gaming. *Howard v. The State*, 516

56. *Words and Phrases.—Public Place.*—The words "on a public highway" are not equivalent to the words "in any public place," used in section 22, 2 R. S. 1876, p. 466, of the act defining misdemeanors.

*Williams v. The State*, 558

57. *Same.—Notorious Lewdness.—Indictment.*—An indictment charging acts constituting "notorious lewdness," as committed "on a public highway," and in the presence of divers persons named, is insufficient. *Ib.*

58. *Same.—Judicial Notice.—Construction of Statute.*—The history of this State, its topography and condition, enter into the construction of its statutes, and are judicially noticed by its courts. *Ib.*

#### CROSS-EXAMINATION.

See CRIMINAL LAW, 7.

#### DAMAGES.

See CONTRACT, 4.

#### DEATH.

See GUARANTY, 8; GUARDIAN AND WARD, 7; WILL, 1.

#### DECEDENTS' ESTATES.

See PRINCIPAL AND SUBETY, 1, 2; SUPREME COURT, 13; WATERCOURSE, 2, 8.

1. *Foreclosure of Mortgage Executed by Decedent.—No Personal Judgment.—Promissory Note.*—In an action to foreclose a mortgage on lands belonging to the estate of a decedent, executed by him in his lifetime to secure the payment of a promissory note also executed by him, to which the administrator is not a party, there can be no personal judgment over for any residue of the mortgage debt remaining unsatisfied on sale of the mortgaged premises. *Rodman v. Rodman*, 65

2. *Same.—Claim for Residue.—Merger.—Cause of Action.—Measure of*

*Damages.*—The judgment of foreclosure in such action does not merge such promissory note; and any claim against the decedent's estate, for an unpaid residue of the mortgage debt, is founded, not upon the judgment of foreclosure, but upon such note; and the administrator is not bound by, but may go behind, the judgment of foreclosure to show the amount really unpaid. *Ib.*

8. *Reopening Final Settlement.*—*Negligence of Executor.*—*Credit for Worthless Claim.*—Negligence on the part of an administrator or executor, in failing to attempt to collect a matured promissory note belonging to his decedent's estate and described upon the inventory thereof, until the maker became insolvent and the note worthless, is ground sufficient, under section 116 of the decedents' estates act, to reopen the final settlement of such executor or administrator, wherein he had asked and received a credit for the amount of such note as a worthless claim.

*Miller v. Steele*, 79

4. *Same.*—*Mistake.*—*Fraud.*—Fraud or mistake on the part of the executor or administrator in making final settlement of his trust is ground sufficient for reopening such settlement. *Ib.*

5. *Objections to Administrator's Report.*—*Arrest of Judgment.*—*Parties.*—Where objections are filed to the allowance of the final settlement report of an administrator, he stands as plaintiff, and the objector as defendant, in the proceeding; and a motion by the administrator in arrest of judgment, on account of the insufficiency of the objections, presents no question for decision, unless the defendant has answered by way of set-off, counter-claim or other affirmative plea, and the finding of the court is founded thereon.

*Brownlee v. Hare*, 311

6. *Proposition, and Promise to Pay for Conveyance.*—*Complaint for Purchase Money.*—*Copy.*—*Estate of Surviving Partner.*—In an action against the administrator of the estate of an intestate surviving partner, by the widow of a debtor of the partnership, the complaint contained a copy, and specifically alleged a compliance with the terms, of a writing executed by the partnership, as follows, viz.: "Mr. S." (the debtor) "requests us to say to you, in writing, what we will pay you, in addition to the claim he and you owe us. We will give you, by you and your husband giving us a clear title of a deed for the farm that is mortgaged to us, three hundred dollars." Prayer for a recovery for the purchase-money.

*Held*, on an assignment of error questioning, for the first time, the sufficiency of the complaint, that the writing is not the foundation of the action, and that the complaint is sufficient. *Huston v. Stewart*, 388

7. *Same.*—*Statute of Frauds.*—*Executed Contract.*—Upon a conveyance of the lands referred to in such writing, the contract ceased to be merely executory, became executed, and was not within the statute of frauds. *Ib.*

8. *Same.*—*Answer of Encumbrance.*—*Reply of Indemnity.*—*Abandonment of*—The defendant in such action answered, that, prior to such conveyance, a judgment had been rendered which was a lien upon the land conveyed; to which the plaintiff replied that the deceased partners had retained, by agreement, a sum of money belonging to the debtor, sufficient to indemnify them against such judgment; and also, in another paragraph, that the amount of such judgment was much less than the sum agreed to be paid for the conveyance, and judgment was demanded for the residue; but on the trial no evidence was offered in support of the reply alleging indemnity.

*Held*, that the reply of indemnity was abandoned, and that the Supreme Court therefore need not consider it.

*Held*, also, on demurrer to such other reply, that it is sufficient. *Ib.*

9. *Same.*—*Evidence.*—*Identifying Lands.*—*Admissions.*—*Acceptance.*—*Presumption.*—On the trial of such action the plaintiff introduced in evidence,

over the defendant's objection, the writing copied into the complaint, proof of its possession by the plaintiff prior to the conveyance, certified copies of the record of such mortgage and conveyance, and also the deed under which the debtor held.

*Held*, that the evidence was competent.

*Held*, also, that the lands intended by the writing are identified by the mortgage and deed.

*Held*, also, that the fact that the deed was of record was *prima facie* evidence of its acceptance by the grantees. *Id.*

10. *Same.—Excessive Damages.*—Interest on the contract price being proper, and having been allowed, and judgment having been rendered simply for the contract price, it is presumed by the Supreme Court, the contrary not appearing by the record, that the judgment lien on the land was liquidated by the interest computed. *Id.*

11. *Same.—Judgment Against Decedent's Estate.*—Judgment in such action was properly rendered payable out of the assets of the decedent's estate. *Id.*

12. *Claim on Promissory Note.—Answer of Failure to Collect.—Collateral.—Negligence.*—In an action by the payee, against the administrator of the estate of the deceased maker, on a promissory note, the defendant answered, alleging that the decedent, on executing the note in suit, had assigned to the payee, as collateral security, a judgment in favor of the decedent, against another, amounting to a sum more than sufficient to satisfy the note in suit; that such judgment was a lien, and also secured by a mortgage, upon real property belonging to the judgment debtor, of a value sufficient to satisfy such judgment; that the judgment debtor was also the owner of personal property subject to execution, of a value sufficient to satisfy such judgment; that, though the payee still held the judgment as collateral, and though the amount thereof could have been made on execution, as the payee well knew, the latter had negligently failed to issue execution thereon; and that, if the note in suit be put in judgment, the personal property of the decedent's estate, which was amply sufficient for the payment of all other debts, would be insufficient, and real estate would have to be sold to pay off the note in suit.

*Held*, on demurrer, that, on behalf of an estate, the answer is sufficient.

*Alexander v. Alexander*, 541

#### DECLARATION.

See CONVEYANCE, 5; CRIMINAL LAW, 36, 40, 42.

#### DEFAULT.

See PRACTICE, 7; REVIEW OF JUDGMENT, 1.

#### DEMAND.

See GUARANTY, 6; PROMISSORY NOTE, 3.

#### DEMURRER.

See MANDATE; MISTAKE; PRACTICE, 2, 3, 6, 9, 10; PROMISSORY NOTE, 17.

#### DEPOSITION.

See EVIDENCE, 2.

#### DESCENTS.

See DOWER; MORTGAGE, 2.

1. *Widow's Descendants.—Complaint.—Action to Quiet Title.—Enjoining Guardian's Sale of Land.*—A complaint alleged that a certain person had died intestate, seized in fee-simple of certain real estate, leaving a widow, but no child or parent, surviving him; that subsequently the widow died, leaving the plaintiffs, her brothers and sisters and the children of such as had died, but no child or parent, surviving her; and that the



defendant, as guardian of a ward not alleged to have been related to the intestate husband, was about to sell such real estate pursuant to an order of court. Prayer, that such sale be enjoined, and that the plaintiffs' title be quieted.

*Held*, on demurrer, that the complaint is sufficient. *Scott v. Silvers*, 76

2. *Death of Widow who was a Second Wife.—Grandchild by Previous Marriage.*—A husband died intestate, leaving no parent, but leaving a widow, who was his second wife and who had borne him a child which did not survive him, and also a grandchild which was the child of a deceased child by his previous marriage, surviving him. Subsequently the widow died without having remarried, leaving brothers and sisters, but no parent or child surviving her.

*Held*, that, upon the death of the widow, all the real estate of which the husband had died seized, descended to the grandchild. *Ib.*

3. *Same.—Section 2 and Proviso of Section 24 Construed.*—The words "children alive," in the proviso of section 24 of the statute of descents, 1 R. S. 1876, p. 412, must, to give effect to section 2 of that act, be construed to mean "children or their descendants alive." *Ib.*

4. *Surviving Second Wife without Issue.—Life-Estate.—Value of, on Partition Sale.*—Where a husband dies leaving children by a deceased former wife, and also a surviving second wife without issue, she is entitled, on a sale of his lands in a partition proceeding, to one-third of the proceeds of such sale after payment of costs, reduced to a sum equal to the value of her life-estate. *Swain v. Hardin*, 85

5. *Conveyance by Widow of Her Third.—Reconveyance to Her on Remarriage.—Rights of Her Widower.—Children by Previous Marriage.*—One-third of the lands of an intestate having been duly partitioned to his widow, and the residue to his children by her, she then, with a view to a second marriage, without consideration and without delivering possession, conveyed her said third to another, by a warranty deed, and, having remarried, such grantee reconveyed the same to her, without consideration. She, having died intestate, left her second husband and such children by her previous marriage surviving her, whereupon he brought an action to partition such third.

*Held*, that he inherited one-third thereof. *Nesbitt v. Trindle*, 183

6. *Same.—Children.—Vested Rights.—Disinheritance.*—Children have no vested rights in lands owned by the parent in fee-simple, neither do they stand to him in the relation of creditors; for the parent may, if he choose, disinherit them. *Ib.*

#### DILIGENCE.

See NEW TRIAL, 2.

#### DIMINUTION OF RECORD.

See SUPREME COURT, 8.

#### DISAFFIRMANCE.

See INFANT, 1.

#### DISINHERITANCE.

See DESCENTS, 6.

#### DISMISSAL OF ACTION.

See JUSTICE OF THE PEACE, 2; PROMISSORY NOTE, 3

#### DISMISSAL OF APPEAL.

See SUPREME COURT, 5, 10, 15.

#### DITCHES AND DRAINS.

See SUPERVISOR; TRESPASS.

1. *Action on Assessment.—Evidence.*—Where, in an action to collect an assessment for the construction of a drain petitioned for after the taking effect of the act of March 9th, 1875, 1 R. S. 1876, p. 428, neither the petition, the finding of the board of commissioners, nor any evidence showing that the drain was necessary and conducive to the public health, convenience or welfare, or of public benefit or utility, is introduced, the finding should be for the defendant. *Tillman v. Kircher*, 104
2. *Same.—Act of 1867.—Record.*—In an action to recover an assessment made under the drainage act of March 11th, 1867, 2 R. S. 1876, p. 684, the record of the petition, upon being properly identified and on proof of the loss of the petition, is competent evidence. *Bate v. Sheets*, 209
3. *Same.—Act of 1875.—Repeal of Statute.*—The drainage act of March 9th, 1875, 1 R. S. 1876, p. 428, repeals the act of March 11th, 1867, only so far as their provisions conflict. *Ib.*
4. *Same.—Evidence.—Section 4 of Act of 1875.*—By section 4 of the act of 1875, it is necessary to establish, even in an action to recover an assessment made under the act of 1867, that the evidence adduced before the board of commissioners showed, and that the board found, the proposed drain to be necessary and conducive to the public health, convenience or welfare, or of public benefit or utility; otherwise the defendant is entitled to recover. *Ib.*
5. *Same.—Section 9 of Act of 1867.—Personal Judgment.—Lien.*—Section 9 of the act of 1867 was not re-enacted or changed by the act of 1875, and under it the plaintiff in such action is entitled to recover, if at all, a personal judgment against the defendant, if a resident, as well as a lien against the land. *Ib.*
6. *Same.—Effect of Act of 1875 on Proceeding Pending Under Act of 1867.*—A proceeding for the construction of a drain, under the act of 1867, which was *in fieri* on the taking effect of the act of 1875, must thereafter have conformed to the requirements of the latter act, where they conflict with those of the previous act. *Ib.*
7. *Same.—Contract.—Remedy.—Vested Right.*—An assessment under the act of 1867 was not a contract, but a remedy, in which there was no vested right. *Ib.*

DOWER.

*Lands Sold on Execution Prior to May 14th, 1852.—Rights of Widow in.*—Tenancies by the courtesy and in dower were abolished by section 16 of the act of May 14th, 1852, "regulating descents," etc., 1 R. S. 1876, p. 408; and therefore the widow of one dying subsequent to the taking effect of that act has no right of dower in real estate belonging to, and sold on execution against, him prior to its taking effect and during the existence of the marriage relation. *Carr v. Brady*, 28

ELECTIONS.

See PROSECUTING ATTORNEY, 7 to 9.

ENTRY.

See INFANT, 2.

ESCAPE.

See HABEAS CORPUS.

ESTOPPEL.

See CONTRACT, 7, 8; CONVEYANCE, 5; GUARDIAN AND WARD, 4.

EVIDENCE.

See BASTARDY; CITIES AND TOWNS, 3; CONTRACT, 1, 4, 15; CRIMINAL LAW, 5 to 7, 13, 18, 20, 23, 25, 29, 30, 34 to 49, 55; DECEDENTS' ES-

TATES, 8, 9; DITCHES AND DRAINS, 1, 2; FIXTURE; FRAUDULENT CONVEYANCE, 4; GUARANTY, 5; INSTRUCTION, 1 to 6, 9; JUDGMENT, 7; MARRIAGE CONTRACT, 4, 5; MORTGAGE, 5, 10; NEW TRIAL, 1; PRACTICE, 1, 8; PROMISSORY NOTE, 3, 10; RAILROAD; REVIEW OF JUDGMENT, 8; SUPREME COURT, 1, 3, 6, 11, 17; TAX TITLE, 2; TRESPASSING ANIMALS, 2; WARRANTY.

1. *Contract for Extension of Time.*—Evidence that, subsequent to an offer by the debtor to pay interest on interest accrued, in consideration of an extension of the time of payment for a specified period, the attorney of the creditor had indefinitely extended such time, pursuant to a direction by the creditor to give the debtor "all the time" that could be safely given, "does not sustain a complaint based upon an alleged contract to pay interest on interest accrued, in consideration of an extension of time." *Rodman v. Rodman*, 65
2. *Instruction.—Comparative Weight of Oral Evidence and Depositions.*—Case Overruled.—On the trial of a cause wherein both oral evidence and depositions of witnesses had been introduced, the court instructed the jury, that, "In weighing the evidence of witnesses, you are to look on their means of knowledge, and at their honesty, in the light of all the corroborating and surrounding facts and circumstances in the case; and in this connection you have a right to look at the appearance of the witnesses upon the stand, and, because of this, *other things being equal* in regard to witnesses, the testimony of those examined in open court is entitled to greater weight than the testimony of witnesses embodied in depositions." Held, that the instruction was erroneous. *Carver v. Louthain*, 38 Ind. 530, overruled in part. *Millner v. Egtin*, 197
3. *Bill of Lading.—Secondary Evidence.*—Without establishing the loss of the originals, and proving that notice has been given to the opposite party to produce duplicates of the same, which are in his possession, copies of bills of lading issued by a common carrier, are not competent evidence to establish the delivery of goods for the value of which suit is brought. *McMakin v. Weston*, 270
4. *Proposition to Pay, to Avoid Lawsuit.*—A proposition to pay money, made by a party expressly to avoid a lawsuit, is not competent evidence against him in an action on the same demand. *Dailey v. Coons*, 546

#### EXECUTION.

See DOWER; INJUNCTION; JUSTICE OF THE PEACE, 5; REPLEVIN BAIL, 1; SUPREME COURT, 3; WILL, 3.

#### EXECUTORS AND ADMINISTRATORS.

See DECEDENTS' ESTATES; SUPREME COURT, 18; WATERCOURSE, 2, 3; WILL, 3.

#### EXHIBIT.

See COPY.

#### EXPERT.

See TRESPASSING ANIMALS, 2.

#### EXTENSION OF TIME.

See EVIDENCE, 1; PRINCIPAL AND SURETY, 3.

#### FALSE IMPRISONMENT.

See HABEAS CORPUS.

#### FALSE PRETENCES.

See CRIMINAL LAW, 53, 54.

**FEES AND SALARIES.**

See PROSECUTING ATTORNEY, 4.

**FEMALE.**

See HABEAS CORPUS, 2.

**FENCES.**

See TRESPASSING ANIMALS.

**FIXTURE.**

*Sale of Land Without Reserving Fixture.—Subsequent Purchaser of Fixture. Promissory Note.—Failure of Consideration.*—The owner of a tract of land upon which he had placed a cane mill, let into the ground, to manufacture his cane crop, sold and conveyed the same without reservation, to a purchaser, and then sold, but did not deliver, the cane mill to a purchaser who executed his promissory note for the purchase price, but the purchaser of the land, on taking possession, refused to allow the purchaser of the mill to remove it.

*Held*, in a suit on the note, originating before a justice of the peace, that the defendant could, without plea, give evidence of either a failure of consideration or a breach of the implied warranty of title to the mill. *Held*, also, that the fixture passed with the land, as part thereof, to the grantee. *Kennard v. Brough*, 28

**FORECLOSURE.**

See CONVEYANCE, 2; CORPORATION, 6 to 10; DECEDENTS' ESTATES, 1, 2; MORTGAGE; TRUSTS.

**FOREIGN CORPORATION.**

See CORPORATION, 1, 11, 12.

**FOREIGN STATE.**

See CORPORATION, 4.

**FORGERY.**

See ATTORNEY, 1 to 4; CRIMINAL LAW, 32, 33.

**FORMER ADJUDICATION.**

See CORONER, 4; GUARDIAN AND WARD, 8; INSTRUCTION, 3.

**FORMER CONVICTION**

See CRIMINAL LAW, 19.

**FORMER RECOVERY.**

See GUARDIAN AND WARD, 8; PRINCIPAL AND SURETY, 1; PROMISSORY NOTE, 1, 9.

**FRAUD.**

See CONTRACT, 3, 10; CONVEYANCE, 3, 5; CRIMINAL LAW, 8; DECEDENTS' ESTATES, 4; FRAUDULENT CONVEYANCE; JUDGMENT, 9; PROMISSORY NOTE, 5 to 7.

**FRAUDULENT CONVEYANCE.**

1. *Complaint to Set Aside.—Husband and Wife.—Infant.—Notice.*—In an action by a judgment creditor, against the judgment debtor, his wife and infant children, and a third person, to set aside, as fraudulent, a conveyance of the real estate of the debtor, executed by him and his wife to such third person, and a subsequent conveyance of the same real estate by the latter to the wife and infant children of the debtor, the complaint alleged the recovery of a judgment by the creditor, against the debtor, for a debt existing at the time such conveyances were made; that execution was issued on such judgment and returned *nulla bona*; that such

conveyances were made without consideration and with intent to defraud the plaintiff; and that, at the time the first conveyance was made, the debtor did not possess other property, subject to execution, sufficient to pay the plaintiff's debt, and is now insolvent.

*Held*, on demurrer by the grantees of the second deed, that the complaint is insufficient.

*Held*, also, that the complaint should have alleged that the grantees had notice of the alleged fraud. *Spaulding v. Myers*, 264

2. *Same.—Cross Complaint.—Mechanic's Lien.*—A cross complaint in such action, by another judgment creditor, alleging the recovery of a judgment against the debtor and a contractor, on a mechanic's lien against part of the real estate conveyed, but alleging no fraud, is insufficient. *Ib.*
3. *Complaint to Set Aside.*—A complaint to set aside an alleged fraudulent conveyance of real estate by a debtor, which does not aver the insolvency of the debtor at the time of making the conveyance, is insufficient on demurrer. *Wedekind v. Parsons*, 290
4. *Same.—Answer.—Evidence.—Harmless Ruling.*—Where, in such action, the defendant has pleaded the general denial, evidence is admissible thereunder to support the deed, and the sustaining of a demurrer to a paragraph of answer pleading such matters specially is harmless. *Ib.*

#### GAMBLER.

See CRIMINAL LAW, 55.

#### GAMING.

See CONTRACT, 9; CRIMINAL LAW, 55.

#### GUARANTY.

1. *Misjoinder of Parties.—Waiver.—Guarantor.*—The misjoinder of a debtor and his guarantor, in an action for the debt, may be waived. *McMakin v. Weston*, 270
2. *Negligence.—Refusal to Allow Plea of Non Est Factum.*—In an action upon a guaranty, wherein issue had been joined for over two years, the defendant, when the cause was called for trial, asked leave to file a plea of *non est factum*.  
*Held*, that he was guilty of negligence, and that leave was properly denied. *Ib.*
3. *Guaranty of Rent.—Action on.—Answer of Lessee's Death.*—In an action by the lessor's endorsee, against the lessee's guarantor, upon a written lease and guaranty, to recover rent due, it is no defence to answer that the rent sued for accrued after the death of the lessee and during the occupancy of the premises by a third person. *Taylor v. Taylor*, 356
4. *Same.—Unnecessary Reply.*—A paragraph of answer simply denying such guaranty needs no reply, and, if such a reply be filed, there is no error in sustaining a demurrer thereto. *Ib.*
5. *Same.—Proof of Service of Notice.—Sheriff's Return.*—A written notice to such guarantor of the default of the lessee, bearing the official certificate of the sheriff that he has served the same upon the guarantor by copy, is competent evidence of service of the notice. *Ib.*
6. *Same.—Lease.—Demand.—Notice.*—Where, by the terms of such lease, the rent is payable at stated times, in specified instalments, the guarantor, on default of the lessee, is immediately liable, without either notice or demand. *Ib.*

#### GUARDIAN AD LITEM.

See INFANT, 4.

#### GUARDIAN AND WARD.

See DESCENTS, 1; JUDGMENT, 9.

1. *Conversion*.—A guardian who uses money belonging to his ward in his own business, or who, for his own use, sells, barter or assigns a chose in action belonging to his ward, is liable on his bond for conversion.  
*Lowry v. State, ex rel., 421*
2. *Conversion of Proceeds of Real Estate.—Liability.—Bond*.—Where the assets converted by a guardian are the proceeds of a sale made by him, by order of court, of his ward's real estate, the action should be brought on the additional bond executed in the proceeding to sell the realty. *Ib.*
3. *Same.—New Bond.—Surety*.—The liability of a surety on a new bond, executed by a guardian after a conversion of his ward's estate, is only prospective. *Ib.*
4. *Same.—Bond Executed Without Assets on Hand.—Report.—Estoppel.—Cases Overruled*.—Where, on the execution of such new bond, the guardian, as such, has in fact no assets, such surety is not liable, though the guardian then and subsequently charge himself, in his reports to the court, as with assets on hand. *The State, ex rel., v. Grammer, 29 Ind. 580, Bagot v. The State, ex rel., 38 Ind. 262, Wilmer v. The State, ex rel., 44 Ind. 223, and The State, ex rel., v. Prather, 44 Ind. 287, are overruled on this point. Ib.*
5. *Complaint on Bond.—Variance.—Copy*.—A complaint on a guardian's bond alleged the execution and contained a copy thereof, but there was a variance between the description given in the complaint and such copy.  
*Held, on demurrer, that the copy controls. Cotton v. The State, ex rel., 578*
6. *Same.—Defective Record.—Amendment.—Supreme Court*.—The record of such cause, on appeal to the Supreme Court by the defendant, omitted the copy of the bond alleged by the complaint to be filed therewith, but an alleged copy thereof was separately attached to the record at the place where it ought to have been inserted.  
*Held, that the record shows that a copy of the bond was filed with the complaint as alleged. Ib.*
7. *Default of Guardian, after Death of Surety*.—The estate of a deceased surety on a guardian's bond is liable for a default of the principal occurring after the death of the surety, but before final settlement of his estate. *Ib.*
8. *Separate Action on Bond.—Former Adjudication or Recovery*.—A guardian and his sureties are liable on his bond, for a breach thereof, to each of several wards for whose benefit the bond was executed, in a separate action thereon by each ward on attaining his majority. And the judgment rendered in an action thereon by one of the wards is no bar to a subsequent action thereon by another ward or his guardian. *Ib.*

#### HABEAS CORPUS.

1. *Petition.—Imprisonment for Violating City Ordinance.—Escape and Recapture*.—In a proceeding for a writ of habeas corpus, against a city marshal, the petition alleged, "that the pretended cause for" the imprisonment of the petitioner by the defendant was, that, on a certain day, the city had "recovered a judgment against the" petitioner for a certain sum and costs, "for and on account of a violation of an ordinance of said city by" the petitioner; that, on said day, the petitioner "was committed to the city prison of said city for failing to pay or replevy said judgment and costs;" that the petitioner had been placed at labor upon the streets of said city, by the defendant, under the care of the street commissioner, and while so laboring he had escaped; and that, more than thirty days after the rendition of said judgment, he had openly returned to said city, whereupon the defendant, without warrant

or other authority, had arrested and imprisoned him, and restrains him of his liberty.

*Held*, on motion to quash the writ, that the petition is sufficient.

*Held*, also, that the re-arrest and commitment of the petitioner, after the expiration of the thirty days, were unlawful.

*Held*, also, that the defendant, by answer, may show that such judgment provided for the imprisonment of the defendant until he had compensated the same by labor. *Flora v. Sachs*, 155

2. *Same.—Judgment.—Imprisonment at Hard Labor.—Payment.—Female.*—Section 20 of the act for the incorporation of cities, 1 R. S. 1876, p. 267, contemplates two different modes of enforcing the payment of a judgment for a violation of a city ordinance, viz.:

*First.* By imprisonment of the defendant, whether a male or female, in the workhouse or city prison, for a period not exceeding thirty days, where the judgment remains unpaid or unreplevied; and,

*Second.* By adjudging that the defendant, if a male, shall be required to pay the judgment and costs by manual labor, he remaining in custody until the judgment has been paid or replevied. *Id.*

3. *Same.—Simple Imprisonment.—Termination of.*—The thirty days' imprisonment is inflicted to enforce payment or replevy of the judgment but does not operate as a payment of the judgment, and must be computed continuously from the date of the judgment. *Id.*

#### HEIR.

See WATERCOURSE, 2.

#### HIGHWAY.

See SUPERVISOR.

#### HORSE-RACING.

See CONTRACT, 5 to 10.

#### HUSBAND AND WIFE.

See CONVEYANCE, 8; CORPORATION, 9; DECEDENTS' ESTATES, 6; DESCENTS, 5; FRAUDULENT CONVEYANCE, 1; MORTGAGE, 1.

#### IMPEACHING WITNESS.

See CRIMINAL LAW, 25, 37, 38, 44, 49.

#### IMPRISONMENT.

See HABEAS CORPUS.

#### INDEMNITY.

See CONTRACT, 1, 5, 11, 13; DECEDENTS' ESTATES, 8; REVIEW OF JUDGMENT, 2.

#### INDICTMENT.

See CRIMINAL LAW, 14, 21, 32, 53, 54, 57.

#### INFANT.

See FRAUDULENT CONVEYANCE, 1.

1. *Conveyance during Infancy.—Disaffirmance.—Adverse Possession.—Action to Recover.*—A conveyance, made by a grantor on attaining the age of twenty-one years, of lands adversely held by one claiming title thereto under a conveyance made by the same grantor during his infancy, is void as against the adverse holder, but operates as a disaffirmance of the first deed, and authorizes the grantee thereunder to sue the adverse holder, in the name of the grantor, for the recovery of such lands.

*Riggs v. Fisk*, 100

2. *Same.—Entry.*—If, by entry or otherwise, prior to the making of such second conveyance, such grantor has obtained possession of such lands, such conveyance is effectual for all purposes. *Ib.*
3. *Process.—Jurisdiction.—Supreme Court.—Appearance after Verdict.*—Where, on appeal to the Supreme Court by the defendants in a cause, part of whom are infants, the record does not show either the issue and service of process against the defendants, or an appearance by them, it is presumed that the lower court had no jurisdiction of them, and the judgment will be reversed, notwithstanding the appearance of an adult defendant, after verdict, to move for a particular judgment. *Carver v. Carver, 194*
4. *Same.—Notice.—Guardian ad Litem.*—No guardian ad litem can be appointed by the court for an infant defendant who has not been personally served with process, if a resident, or, if a non-resident, with notice by publication. *Ib.*

## INJUNCTION.

See COSTS ; DESCENTS, 1 ; JUDGMENT, 8 ; WILL, 8.

*Execution on Judgment for Recovery of Lands Irregularly Vacated Without Objection.—Costs.*—Where, without objection by the plaintiff, an order is granted, setting aside a judgment in his favor for the recovery of lands, and granting the defendant a new trial on subsequent payment of the costs accrued, and, after appearing to the action without objection during several subsequent terms of court, the plaintiff dismisses his action, orders out a writ of ejectment based on such vacated judgment, and commences a new action to recover the lands, the defendant may enjoin the execution of such writ. *Marsh v. Prosser, 298*

## INQUEST.

See CORONER.

## INSANE PERSON.

See JUDGMENT, 9.

*Contract.*—The contract of an insane person not under guardianship is voidable merely. *Wray v. Chandler, 146*

## INSANITY.

See CRIMINAL LAW, 27, 28.

## INSOLVENCY.

See CORPORATION, 11 ; PROMISSORY NOTE, 8.

## INSTRUCTION TO JURY.

See ATTORNEY, 4 ; CONTRACT, 2 ; CRIMINAL LAW, 8 to 10, 22, 28, 26, 45 to 51 ; MARRIAGE CONTRACT, 4, 5 ; PROMISSORY NOTE, 12 ; SUPREME COURT, 14 ; TRESPASSING ANIMALS.

1. *Presumption.—Supreme Court.*—Where, on appeal to the Supreme Court, the evidence is not in the record, the Supreme Court will presume that the instructions to the jury, if not abstractly wrong, were properly given. *Wilkinson v. Applegate, 98*
2. *Facts Outside the Issues.*—An instruction to a jury, authorizing them to consider matters foreign to the issues, is erroneous. *Terry v. Shively, 106*
3. *Action on Account, for Cash Paid.—Settlement.—Former Adjudication.—Payment.*—In an action on account for personal property sold and delivered, wherein the defendant answered the general denial, settlement, former adjudication and payment, and the plaintiff replied the general denial, the court instructed the jury, that, in arriving at a verdict, they might consider, on behalf of the plaintiff, any payments made



by him on a certain judgment theretofore recovered against him by the defendant.

*Held*, that the instruction was erroneous.

*Held*, also, that evidence of such payments was inadmissible.

*Ib.*

4. *Ignoring Defence*.—Where, in such action, there was evidence tending to sustain each of such special defences, an instruction to the jury, limiting their attention, and the defendant's right to recover, to one only of these defences, is erroneous. *Ib.*

5. *Settlement*.—An instruction in such action, that, to entitle the defendant to recover on the alleged settlement, he must have established, that, on such settlement, a balance remained due to him, is erroneous. *Ib.*

6. *Promissory Note Executed on Settlement*.—*Legal Effect of*.—The paragraph of defence alleging settlement, having also alleged that the plaintiff had executed his promissory note to the defendant for the balance due on settlement, it was error to instruct the jury to determine the legal effect of such note; that being a question of law solely for the court. *Ib.*

7. *Harmless Refusal*.—Where the substance of an instruction refused is embraced in one given, the refusal is harmless. *Hadley v. Prather*, 137

8. *Uncertainty*.—The court may refuse to give to the jury an instruction asked, which is indefinite and ambiguous. *Loeb v. Weis*, 285

9. *Reference to Facts not in Evidence*.—On the trial of an action on account for services rendered, wherein the evidence incidentally disclosed that the parties were related, the court instructed the jury, that, if they believed "from the evidence, that the plaintiff" was "the son-in-law of the defendant, and went into the service of the defendant with the understanding that he was to charge nothing for his services, but was to look to the amount his wife was to receive from the estate of her father, then the plaintiff can not recover."

*Held*, there being no evidence of such an understanding, that the instruction was erroneous, and was prejudicial to the plaintiff.

*McMahon v. Flanders*, 334

10. *Record*.—*Bill of Exceptions*.—An instruction to a jury, which is signed by the judge, and at the close of which a party has objected and excepted in writing, over the signature of his attorney, is part of the record, without a bill of exceptions. *Cooper v. Board of Comm'rs, etc.*, 520

#### INSURANCE COMPANY.

See CORPORATION, 1 to 10.

#### INTEREST.

See CONTRACT, 2; DECEDENTS' ESTATES, 10; PROMISSORY NOTE, 12, 13.

*Voluntary Payment of*.—*Recoupment*.—*Promissory Note*.—Interest at the rate of ten per cent., voluntarily paid and accepted after maturity, on a promissory note stipulating for only six per cent., can not be recouped. *Snyder v. Braden*, 58 Ind. 143, overruled. *Hiatt v. Renk*, 590

#### INTIMIDATION.

See CRIMINAL LAW, 37 to 39, 44, 49.

#### INTOXICATION.

See CRIMINAL LAW, 7, 27 to 29.

#### JOINDER OF ACTIONS.

See JUSTICE OF THE PEACE, 4.

#### JUDGMENT.

See ATTORNEY, 5, 6; DECEDENTS' ESTATES, 1, 2, 11, 12; DITCHES AND

DRAINS, 5; GUARDIAN AND WARD, 8; HABEAS CORPUS; INJUNCTION; JUSTICE OF THE PEACE, 2 to 5; MORTGAGE, 4, 9; PLEADING, 8; PRACTICE, 11; PRINCIPAL AND SURETY, 1; PROMISSORY NOTE, 1, 9, 17; SUPREME COURT, 2, 8, 4, 18; TAX TITLE, 4.

1. *Discharge of Joint Maker by Judgment against Co-Maker.*—A separate judgment against one of several joint makers of a promissory note, rendered in an action to which the other makers were not parties, and in which steps were not taken to preserve the right to a subsequent judgment against them, is a bar to a subsequent action thereon against them.  
*Kennard v. Carter*, 81
2. *Modes of Obtaining Judgments.*—Judgments may be rendered, either in the circuit court or by a justice of the peace, in either of three modes, viz.: 1. In an action commenced by process; 2. In an action commenced by agreement; or, 3. By confession without an action. *Ib.*
3. *By Confession without Affidavit.*—A judgment by confession is valid between the parties thereto, though rendered without any, or upon an insufficient, affidavit. *Ib.*
4. *Same.—Consent of Plaintiff.—Presumption.*—A judgment by confession can not be rendered without the consent of the plaintiff; but that consent may, where the contrary does not appear, be presumed from the record. *Ib.*
5. *Same.—Refusal to Consent.*—The refusal of the plaintiff to consent to such a judgment may be replied by him to an answer setting up such judgment. *Ib.*
6. *Informality of.*—A judgment is not rendered void by mere informality in its terms. *Ib.*
7. *Judgment of Justice, How Proved.—Evidence.*—The proceedings and judgment of a justice of the peace may be proved by either the original or a duly certified copy thereof. *Ib.*
8. *Release of, on Abandonment of Appeal from.—Injunction.*—The abandonment, by a judgment defendant, of his right to appeal from a judgment to the Supreme Court, is a valid consideration for the execution, by the judgment plaintiff, of a release of such judgment. And, upon obtaining such release, he may maintain an action to enjoin the collection of an execution subsequently issued upon such judgment, and to have the judgment satisfied. *Wray v. Chandler*, 146
9. *Same.—Fraud.—Insane Person.—Plea of Fraud, by Guardian or Committee.*—Fraud in procuring such release, practised by the judgment plaintiff upon the judgment defendant, is a good defence to such action; and where the former, since the execution of such release, has been duly declared of unsound mind, the fraud may be pleaded on his behalf by his guardian or committee. *Ib.*
10. *Follows Verdict.—Unnecessary Party.—Clerical Error.*—Where, though the complaint states no cause of action against any but the defendant, a third person is permitted, on his own petition, to appear and answer, and a verdict is found against "the defendant," the use of the word "defendants" in the judgment will be treated as a mere clerical error, and the judgment be held as one against the original defendant only.  
*Taylor v. Taylor*, 356

#### JUDICIAL NOTICE.

See CONVEYANCE, 1; CRIMINAL LAW, 58.

#### JUDICIAL SALE.

See MORTGAGE, 8.

#### JURISDICTION.

See ATTORNEY, 7; INFANT, 8; JUSTICE OF THE PEACE, 1, 4; PROMISSORY NOTE, 8; RAILROAD; SUPREME COURT, 15.

## JURY.

See CRIMINAL LAW, 11, 12; INSTRUCTION, 6.

1. *Relationship to Party.—Second Cousin.—Rules of Civil Law.*—Relationship, either by consanguinity or affinity, within the sixth degree inclusive by the rules of the civil law, existing between a juror and a party to an action, disqualifies such juror to sit as such upon the trial of that action, even though such relationship be unknown to both the juror and the party until after the trial. *Hudspeth v. Herston*, 133
2. *Examination of, by Court.—Knowledge of Relationship.—Waiver.*—A jury, upon being duly sworn, answered in the negative a question put to them by the court as to whether any of them were "related, by blood or marriage, to either party to the suit," whereupon they were sworn and tried the cause. A motion was made by the losing party, for a new trial, upon the ground that he had, since the trial, discovered that one of the jurors was a second cousin of the opposite party. *Held*, that, though neither the juror nor the successful party knew of such relationship until after the trial, and though the losing party had not questioned the jury concerning the matter of relationship, he had not waived his right, but was entitled, to a new trial. *Ib.*

## JUSTICE OF THE PEACE.

See APPEAL BOND; CRIMINAL LAW, 16; FIXTURE; JUDGMENT, 2; PROSECUTING ATTORNEY, 4; SUPREME COURT, 15.

1. *Verdict for Over Two Hundred Dollars.—Remittitur.*—In an action originating before a justice of the peace, wherein the amount demanded was less than two hundred dollars, the jury trying the cause in the circuit court, on appeal, found a verdict for more than two hundred dollars, whereupon the party recovering remitted all damages in excess of the amount demanded, and judgment was rendered for the residue. *Held*, that the verdict did not oust jurisdiction, and that the remittitur and judgment were proper. *Louisville, etc., R. W. Co. v. Breckenridge*, 113
2. *Finding and Judgment More than Four Days After Trial.*—The fact that the justice's transcript, in a cause appealed from a judgment rendered by him to the circuit court, shows that his finding was made and the judgment rendered by him more than four days after the trial of the cause, is not ground for dismissing the cause. *The State, ex rel., v. Brewer*, 131
3. *Same.*—The entry of such judgment was an act *coram non judice*, but, on appeal to the circuit court, the judgment was opened and the cause there stood for trial *de novo*. *Ib.*
4. *Jurisdiction.—Recovery Demanded.—Judgment.—Joinder of Actions.*—In an action before a justice of the peace, wherein one paragraph of the complaint demanded the recovery of personal property valued at fifty dollars and fifty dollars damages for the detention thereof, and another paragraph demanded judgment for one hundred and six dollars "additional," for moneys alleged to have been embezzled by the defendant, judgment was rendered against the defendant, by default, for one hundred and fifty-six dollars. *Held*, that the amount claimed exceeded the justice's jurisdiction, and that therefore the judgment was void. *State, ex rel., v. Forry*, 260
5. *Same.—Execution.—Liability of Constable.*—A constable holding an execution upon such judgment is not liable for a failure to levy and sell. *Ib.*

## LANDLORD AND TENANT.

See GUARANTY, 3.

## LARCENY.

See CRIMINAL LAW, 14.

LEASE.

See GUARANTY, 8 to 6.

LEGACY.

See WILL, 3.

LEWDNESS.

See CRIMINAL LAW, 56 to 58.

LICENSE.

See TRESPASS.

LIEN.

See DITCHES AND DRAINS, 5.

LIFE-ESTATE.

See DESCENTS, 4.

LIQUOR LAW.

*Sale after Granting, but Before Issuing, License.*—A prosecution for selling intoxicating liquor without license was submitted to the court for trial, upon an agreed statement of facts, substantially as follows, viz.: That the defendant, by his authorized agent, had made the alleged sale; that, prior thereto, upon a sufficient application and due notice thereof, the proper board of commissioners had granted him a license to sell intoxicating liquors, and he had filed, and procured the proper approval of, the bond required by law; that, without any intention to violate the law, he had neglected to pay his license fee and take out his license, until a time subsequent to the time such sale was made, but prior to the commencement of the prosecution; and that the sale was made within the period covered by the license.

*Held*, that, though the sale, when made, was unlawful, and one for which the defendant could then have been prosecuted, yet the payment of the license fee and issuing of the license shielded him from subsequent prosecution therefor.

*Vannoy v. The State, 447*

MALICE.

See CRIMINAL LAW, 10, 15, 35.

MALPRACTICE.

*Complaint against Physician.*—*Tort.*—*Contract.*—*Contributory Negligence.*—

In an action against a physician, for malpractice, the complaint alleged, that the defendant had undertaken, on promise of compensation, to perform certain duties in the line of his profession, for the plaintiff, in treating him for a wound; but that the defendant had both neglected to perform such duties professionally and had performed them in an improper manner, resulting in a permanent physical injury to the plaintiff.

*Held*, on demurrer for insufficiency, that the action, though sounding in tort, is founded upon a contract, and that the complaint need not aver a want of negligence on the part of the plaintiff.

*Coon v. Vaughn, 89*

MANDATE.

See ATTORNEY, 6, 7; COSTS.

*Complaint.*—*Demurrer.*—*Practice.*—The alternative writ of mandate embodying the affidavit upon which it is issued, and not the affidavit itself, is, in legal effect, the petitioner's complaint; and a demurrer by the defendant should attack the writ and not simply the affidavit.

*Johnson v. Smith, 275*

MARRIAGE CONTRACT.

1. *Promise of Marriage.*—*Complaint for Breach.*—*Request of Performance.*

—In an action for a breach of a mutual promise to marry on a certain day, the complaint need not aver a request for performance.

*Graham v. Martin*, 567

2. *Place of Performance*.—The residence of the woman is, *prima facie*, the place of marriage, when the promise is silent on that point. *Ib.*
3. *Request of Performance*.—In an action for a breach of a mutual promise to marry, wherein the complaint avers the marriage of the defendant to another, it is not necessary to aver that the plaintiff had requested the defendant to fulfil the promise. *Ib.*
4. *Readiness to Perform*.—*Instruction*.—*Evidence*.—An allegation of the readiness of the plaintiff to fulfil the marriage promise is material, and one which must be proved; and it was error to instruct the jury, in such case, that the plaintiff was entitled to recover on proof simply of the mutual promise and the defendant's marriage to another. *Ib.*
5. *Same*.—*Preparation by Plaintiff to Marry*.—It is error to instruct the jury, that, in deciding whether the alleged promise had been made, they might consider evidence given of "any preparation" made by the plaintiff "for marriage." *Ib.*

#### MARRIED WOMAN.

See TRUSTS, 2.

*Promissory Note*.—*Contract*.—*Stipulation to Pay Out of Separate Property*.—A promissory note or parol contract by a married woman, stipulating for the payment, out of her separate property, of the price of a piano purchased by her, can not be enforced against either her or the rents of her separate property. *Richards v. O'Brien*, 418

#### MASTER AND SERVANT.

See CRIMINAL LAW, 53, 54.

#### MASTER COMMISSIONER.

See PRACTICE, 5.

#### MAYOR OF CITY.

See CRIMINAL LAW, 16, 55.

#### MEASURE OF DAMAGES.

See CORONER, 8; DECEDENTS' ESTATES, 2; PROMISSORY NOTE, 11, 12; WARRANTY, 3, 4.

#### MECHANIC'S LIEN.

See FRAUDULENT CONVEYANCE, 2.

1. *Notice Claiming too Much*.—*Special Finding*.—In an action to enforce a mechanic's lien, the court found specially that the amount really due to the plaintiff was much less than the amount claimed in the notice of the lien, but also found that the notice was recorded in good faith, under a mistaken opinion as to the amount due.  
*Held*, the evidence not being in the record, no objection having been made to the introduction of the notice in evidence, if, indeed, it was introduced, and the complaint not having been attacked by demurrer, that the conclusion of law authorized a judgment for the plaintiff.  
*Harrington v. Dollman*, 255
2. *Purchaser of Part of Property*.—*Joint Action Against Grantor and Grantee*.—*Application of Payment*.—*Special Finding*.—In an action to enforce separate mechanic's liens, upon several tracts of real estate, for separate buildings thereon, against the owner of the same at the time such buildings were erected, and a purchaser of one of the tracts subsequent to the filing of the notices of the liens, the court found specially, on the trial, that certain sums had been paid on each lien respectively,

and that a certain other sum, exceeding the amount yet due on the purchaser's tract, had been paid "without specifying" that "any particular amount" should be applied "on either of said houses."  
*Held*, that, as a conclusion of law, such payment should be applied first to the discharge of the lien on such purchaser's tract.

*Dungan v. Dollman*, 327

MERGER.

See DECEDENTS' ESTATES, 2.

MISCHIEF.

See CRIMINAL LAW, 15.

MISCONDUCT OF JUROR.

See CRIMINAL LAW, 11, 12.

MISJOINDER OF ACTIONS.

See JUSTICE OF THE PEACE, 4; PROMISSORY NOTE, 17.

MISJOINDER OF PARTIES.

See GUARANTY, 1; PROMISSORY NOTE, 8.

MISTAKE.

See ATTORNEY, 4; CONVEYANCE, 1, 2; DECEDENTS' ESTATES, 4; JUDGMENT, 10; MORTGAGE, 4 to 6; SUPREME COURT, 8.

*Reformation of Quitclaim.—Partition.—Complaint.—Uncertainty.—Demurrer.*—A complaint alleged, that, on a certain day, about five years prior to the bringing of the action, the plaintiff was the owner of the undivided one-fifth part of certain lands; that, at that time, the plaintiff and defendant both mistakenly supposed the plaintiff's interest in such lands to be but the undivided three-twentieths; that, on that day, the plaintiff sold to the defendant her supposed interest at a certain price per acre, which was paid and possession delivered accordingly; and that the plaintiff quitclaimed to the defendant all her interest in the whole tract, intending to thereby convey, and the defendant intending thereby to receive a conveyance for, only such supposed interest. Prayer for a reformation of the deed, for partition, for an accounting, "and for all proper relief."

*Held*, on demurrer, that the complaint, though uncertain and vague, is sufficient to entitle the plaintiff to some relief. *Fly v. Brooks*, 50

MORTGAGE.

See CONVEYANCE, 2, 3; CORPORATION, 6 to 11; DECEDENTS' ESTATES, 1, 2; TRUSTS.

1. *Grantee of Encumbered Lands.—Wife's Inchoate Interest.*—The wife of the grantee of lands encumbered by a mortgage has no inchoate rights in the land, as against the mortgagee. *Kissel v. Eaton*, 248
2. *Same.—Rights of Widow.—Redemption.—Partition.—Descents.*—Upon the death of the grantee, and the sale and conveyance of such lands by the sheriff pursuant to an order of sale issued upon a decree of foreclosure of such mortgage, rendered in an action to which she was not a party, the widow is entitled to redeem, but not to partition. *Ib.*
3. *Same.—Judicial Sale.*—The decree and sale in such case do not come within the provisions of the act of March 11th, 1875, 1 R. S. 1876, p. 554, in relation to inchoate interests of married women. *Ib.*
4. *Mistake.—Action to Reform, Against Judgment Creditor.—Purchaser Without Notice.*—A mortgage may be reformed as against the judgment plaintiff, so as to include real estate upon which a judgment is a lien, and which, by mistake, was not included in the mortgage; but such

reformation can not be had as against a purchaser of such judgment for a valuable consideration, without notice of the mistake made in the mortgage. *Wainwright v. Flanders*, 306

5. *Same.—Evidence of Notice.*—In an action by the holder of such mortgage, against such purchaser, to reform such mistake, of which the defendant was alleged to have had notice, the mistake being a misdescription of one of several tracts of land intended to have been included in the mortgage, the plaintiff offered to prove that the defendant had insisted on, and succeeded in, purchasing the judgment at much less than its face, by reason of the existence of the mortgage as a prior lien.

*Held*, that the exclusion of the evidence was not error. *Ib.*

6. *Misdescription.—Complaint Against Subsequent Purchaser.—Notice.*—In an action against the mortgagor and a subsequent purchaser, to foreclose a duly recorded mortgage on real estate described therein as "three town lots, \* being all the town lots owned by the" mortgagor, in a certain town, the complaint, without alleging any mistake in the drawing of the mortgage, alleged that the intention of the parties was to mortgage a certain tract of land adjoining said town, and that, as the purchaser well knew, such tract was all the land owned by the mortgagor in or about such town.

*Held*, on demurrer by the purchaser, that the complaint is insufficient.

*Held*, also, the contrary not being alleged, that he is presumed to be a purchaser for a valuable consideration.

*Held*, also, that the record of the mortgage was constructive notice of its own contents only.

*Held*, also, that a complaint to reform and foreclose such mortgage, for mistake, should allege a mutual mistake by the parties thereto, and that the purchaser had actual notice thereof. *Easter v. Severin*, 375

7. *Foreclosure.*—A complaint for foreclosure was based upon a writing executed by A. to B., reading "This indenture witnesseth that" A., "\*, for the sum of \*, has mortgaged and assigned to" B. " \* the Monticello Woollen Mills situated \*, consisting of the building, all the machinery therein," etc., to secure certain promissory notes described therein.

*Held*, that the instrument sued upon is a mortgage. *Snyder v. Bunnell*, 403

8. *Same.—Averment as to Record.*—The complaint in an action to foreclose a mortgage need not aver that the mortgage has been recorded, where the action is between the original parties to the mortgage, or their assignees or legal representatives. *Ib.*

9. *Foreclosure of Absolute Deed Intended as Mortgage.—Finding and Judgment.*—A complaint for foreclosure alleged the execution to the plaintiff, by the defendants, of a warranty deed for certain lands, as security for the payment of a debt; that the plaintiff had verbally agreed to reconvey the lands on payment of the debt; and that the debt was due and unpaid. The court, upon trial, found "that the equity of redemption of the defendants to the lands \* be foreclosed, \* and that the deed \* be absolute," and judgment was rendered for foreclosure, and that the deed "be, and the same is now declared, absolute."

*Held*, that the finding and judgment should have been for the amount due, that the deed was only a mortgage, and for foreclosure and sale.

*Smith v. Brand*, 427

10. *Foreclosure Against Subsequent Purchaser.—Evidence.*—In an action to foreclose a mortgage on real estate, against a subsequent purchaser, the evidence must show that the mortgage was recorded, or that the purchaser had notice thereof at the time of the purchase, or judgment of foreclosure is erroneous. *Hiatt v. Renk*, 590

#### MURDER.

See CRIMINAL LAW, 6 to 12, 21, 34 to 50.

## NAVIGABLE STREAM.

See WATERCOURSE, 1.

## NEGLIGENCE.

See CONTRACT, 10; CRIMINAL LAW, 58; DECEDENTS' ESTATES, 8, 4, 12; GUARANTY, 2; MALPRACTICE; PROMISSORY NOTE, 6, 16; SUPREME COURT, 8.

*Erection of Building by Contractor.—Excavation in Sidewalk of City.—Injury of Passer-By.—Owner not Liable for Contractor's Negligence.—Nuisance per se.—Case Overruled.—Copy.*—In an action against the owner of a certain lot, fronting upon a sidewalk of a public street, in a city, and one who had contracted with him to erect a building thereon, to recover damages for a physical injury received by the plaintiff through the alleged negligence of the defendants in leaving open an excavation made by them in the ground theretofore covered by the sidewalk, wherein the complaint alleged that the excavation was made in the course of the erection of such building, and that the defendants had negligently covered a part of the excavation in such manner as to constitute a continuation of the sidewalk, but had left open the other part, into which the plaintiff, without fault, had fallen, while passing along such sidewalk in the night-time, the owner answered admitting the injury received by the plaintiff, but alleging that such lot and its appurtenances, at the time of the injury, were in the exclusive possession of the contractor, a skilful, reliable and competent builder, pursuant to a written contract between them for the erection of such building, and that, at that time, neither the owner, nor any agent, servant or person in his employ or under his control, had any charge, management or control of the premises, and that the acts charged as the cause of the injury were not the acts of either the owner, his agents, servants or employees.

*Held*, on demurrer, that the answer is sufficient. *Silvers v. Nerdlinger*, 80 Ind. 53, overruled in part.

*Held*, also, that a copy of such contract, attached to the answer as an exhibit, forms no part thereof.

*Held*, also, that, unless the work contracted for is a nuisance *per se*, the owner is not liable for the negligence of the contractor.

*Ryan v. Curran*, 345

## NEW TRIAL.

See ATTORNEY, 8; CRIMINAL LAW, 5, 11 to 13, 80; JURY, 2; PRACTICE, 5; SUPREME COURT, 1, 14.

1. *Evidence.—Motion.*—A motion for a new trial on the ground of the admission of incompetent or illegal evidence should clearly designate such evidence. *Galvin v. The State, ex rel.*, 96
2. *Newly-Discovered Evidence.—Surprise.—Diligence.*—A motion for a new trial on the ground of newly-discovered evidence or surprise should be denied, where, from the motion or the evidence, it appears that the applicant did not use due diligence to procure the evidence or to avoid the surprise. *Ex Parte Walls*, 461
3. *Record.—Motion.—Bill of Exceptions.*—A motion for a new trial is part of the record, without a bill of exceptions. *Cooper v. Board of Comm'rs, etc.*, 520
4. *Compelling Trial Without Issue.—Waiver.*—Irregularity, in compelling the defendant to go to trial without requiring a reply to a special answer, is cause for a new trial, but is waived by his failure to give evidence under such answer. *Hiatt v. Renk*, 590

## NEWLY-DISCOVERED EVIDENCE.

See CRIMINAL LAW, 80; NEW TRIAL, 2.



## NOLLE PROSEQUI.

See CRIMINAL LAW, 24.

## NOTICE.

See CONVEYANCE, 5; CORONER, 7; DECEDENTS' ESTATES, 12; FRAUDULENT CONVEYANCE, 1; GUARANTY, 5, 6; INFANT, 4; MECHANIC'S LIEN, 1; MORTGAGE, 4, 5; SUPREME COURT, 5; TRUSTS.

## NOTORIOUS LEWDNESS.

See CRIMINAL LAW, 56 to 58.

## NOVATION.

See CORPORATION, 11.

## NUISANCE.

See NEGLIGENCE.

## NUNC PRO TUNC ENTRY.

See CITIES AND TOWNS, 4.

## OBSTRUCTION OF WATERCOURSE.

See WATERCOURSE, 2 to 6.

## OVERFLOWING LANDS.

See SUPERVISOR; TRESPASS; WATERCOURSE, 2 to 6.

## PARENT AND CHILD.

See DESCENTS, 6.

## PARTIES.

See CONTRACT, 5; DECEDENTS' ESTATES, 5; JUDGMENT, 9, 10; REAL ESTATE, ACTION TO RECOVER.

## PARTITION.

See CONTRACT, 15; CONVEYANCE, 3; DESCENTS, 4, 5; MISTAKE; MORTGAGE. 2.

## PARTNERSHIP.

See CONTRACT, 13; DECEDENTS' ESTATES, 6.

*Implied from Acts or Declarations.—Contract.*—One who, by his acts or declarations, creates in the mind of another a reasonable belief that he and a third person are copartners in a particular business, is liable to the person so believing, on a *bona fide* contract made by the latter with such supposed copartner, as such, in the regular course of such business, although in fact no such partnership existed. *Dailey v. Coons*, 545

## PATENT-RIGHT.

See PROMISSORY NOTE, 6.

## PAUPER.

*Contract by County Board with Physician.—Action on Account for Extra Services for Non-Resident Paupers.*—In an action on account, by a physician, against the board of commissioners of a county, to recover for professional services rendered by the plaintiff for certain alleged non-resident paupers, the defendant pleaded and proved that the plaintiff, during the time such services were rendered, was employed by the defendant, at a specified salary, pursuant to a contract in writing, to "do all the pauper practice in" a certain township, "including the county asylum and jail," and "to present no claims or demands for any extra charges." *Held*, that, by the contract, the plaintiff was bound on the application of the

proper officers, to treat non-resident paupers within such township without extra charge.  
*Cooper v. Board of Commissioners, etc.*, 520

PAYMENT.

See CORPORATION, 11; HABEAS CORPUS, 2, 3; INSTRUCTION, 8; MECHANIC'S LIEN, 2.

PERFORMANCE.

See MARRIAGE CONTRACT.

PERJURY.

See CRIMINAL LAW, 38, 39, 44, 49.

PERSONATION.

See CRIMINAL LAW, 53.

PLACE.

See MARRIAGE CONTRACT.

PLEADING.

See CONTRACT, 3, 5, 8 to 10, 12; CONVEYANCE, 3 to 5; CORPORATION, 6, 9, 10, 12; DECEDENTS' ESTATES, 5, 6, 8, 12; DESCENTS, 1; FIXTURE; FRAUDULENT CONVEYANCE; GUARANTY, 2 to 4; GUARDIAN AND WARD, 5, 6, 8; HABEAS CORPUS; JUDGMENT, 9; JUSTICE OF THE PEACE, 4; MALPRACTICE; MANDATE; MARRIAGE CONTRACT; MISTAKE; MORTGAGE, 6 to 9; NEGLIGENCE; PRACTICE, 1, 3, 4, 6, 9, 11; PRINCIPAL AND SURETY; PROMISSORY NOTE, 1, 3, 6, 9, 14, 15, 17; REVIEW OF JUDGMENT, 2, 3; SUPREME COURT, 16; TRESPASS; WARRANTY; WATER-COURSE, 2; WILL, 1 to 3.

1. *Counter-Claim.—Answer.*—No single pleading can perform the double office of answer and counter-claim. *Hadley v. Prather*, 137
2. *Practice.—Harmless Error.*—Error in sustaining a demurrer to a paragraph of a pleading is harmless, if the facts therein alleged are admissible in evidence under a remaining paragraph. *Ib.*
3. *Judgment.—Copy.—Exhibit.*—A judgment pleaded in bar of an action is not a "written instrument" within the meaning of section 78 of the practice act, and neither it nor a copy thereof need be filed with the pleading. *Morrison v. Fishel*, 177
4. *Complaint.—Uncertainty Cured by Verdict.*—A substantial cause of action which, though defectively stated, is not attacked before verdict by demurrer or motion, will sustain a verdict and judgment. *McMakin v. Weston*, 270

POOL-SELLING.

See CONTRACT, 9.

POSSESSION.

See DECEDENTS' ESTATES, 9.

PRACTICE.

See FIXTURE; GUARANTY, 2, 4; MANDATE; PLEADING, 2; REAL ESTATE, ACTION TO RECOVER; SUPREME COURT, 1, 3, 5, 7, 8, 11 to 16.

1. *Motion to Strike Out.—Error rendered Harmless.—Evidence.*—Error in overruling a motion to strike out parts of a complaint may be rendered harmless by objecting to the admission of evidence sustaining the improper allegations. *Galvin v. The State, ex rel.*, 96
2. *Waiver of Demurrer by Answer.*—Where the defendant in an action answers prior to, and without, a decision upon a demurrer previously filed by him to the complaint, he thereby waives his demurrer. *Moss v. Witness Printing Co.*, 125

3. *Demurrer Waived by Pleading.*—Where a party who has filed a demurrer to a pleading pleads thereto before his demurrer has been ruled upon, he thereby waives his demurrer. *Morrison v. Fishel*, 177
4. *Motion in Arrest, When Made.*—A motion in arrest must precede the judgment sought to be arrested. *Brownlee v. Hare*, 311
5. *Agreement to Submit.—Master Commissioner.—Trial without Issue.*—Where the parties to a cause agree in writing, that the cause shall be heard and decided upon the evidence taken and reported by a master commissioner appointed by the court, neither party can, after decision, be heard to complain that no issue had been formed in the cause. *Ib.*
6. *Uncertainty in Pleading.—Motion.—Demurrer.*—Mere uncertainty in a pleading can be reached only by motion to make certain, and not by demurrer. *Hampson v. Fall*, 382
7. *Failure to Perfect Change of Venue.—Failure to Answer.—Trial as Up-on Default.*—In an action wherein a defendant had appeared, demurred, and been ruled to answer to a cross complaint filed by a co-defendant, a change of venue from the county was granted but never perfected, whereupon the court, at its next term, made the rule to answer absolute and tried the cause.  
*Held*, that the action of the court was proper. *Snyder v. Bunnell*, 403
8. *Grounds of Objection to Evidence.*—An objection to the admission of evidence introduced should clearly point out to the court below the grounds of the objection. *Whitecotton v. Landon*, 420
9. *Uncertainty in Pleading.—Demurrer.—Motion.*—Where a pleading states a sufficient cause of action in a vague or indefinite manner, the defect can be reached, not by demurrer, but only by motion to make more certain and specific. *Jameson v. Board of Commissioners, etc.*, 524
10. *Special Demurrer.—Uncertainty.—Amendment.*—There is no special demurrer, under the code of this State, its place being occupied by the controlling power of the court to amend, render more certain or strike out pleadings or parts thereof. *Graham v. Martin*, 567
11. *Striking Out Answer Filed Without Leave.—Bill of Exceptions.—Judgment on Pleadings.*—A cause pending on a rule to reply having been announced by the parties several days before the time fixed to try it, as ready for trial, the defendant afterward filed an additional answer without leave of court, and, when the cause was called for trial, he objected that it was not at issue, whereupon the court struck out the additional answer and tried the cause without a reply.  
*Held*, the answer struck out not being made part of the record by bill of exceptions, that the action of the court was proper, and that the defendant is not entitled to judgment on the pleadings. *Hiatt v. Renk*, 590

#### PREMIUM.

See CONTRACT, 5 to 10.

#### PRESUMPTION.

See COSTS; DECEDENTS' ESTATES, 9, 10; INFANT, 3; INSTRUCTION, 1; JUDGMENT, 4; SUPREME COURT, 3; WARRANTY, 1.

#### PRICE-LIST.

See WARRANTY, 2.

#### PRINCIPAL AND AGENT.

See CRIMINAL LAW, 53, 54; NEGLIGENCE; REVIEW OF JUDGMENT, 2.

#### PRINCIPAL AND SURETY.

See APPEAL BOND; GUARDIAN AND WARD, 3, 7; PROMISSORY NOTE, 17; REPLEVIN; REVIEW OF JUDGMENT, 2.

1. *Joint and Several Promissory Note.—Judgment on, Against Deceased Principal's Estate.—Answer by Surety.*—In an action on a joint and several promissory note, against one only of the makers, he answered that he was surety only for his co-maker, who had deceased, that the note had been filed and allowed as a claim against the estate of the principal, which was solvent, and that steps were being taken by the administrator of such estate to realize money to pay off the note in suit.  
*Held*, on demurrer, that the answer is insufficient. *Hayes v. Hayes*, 248
2. *Same.—Plea of Suretyship.*—An answer by such defendant, alleging his suretyship, and asking that such administrator be made a party and that execution be first levied upon the property of the estate, is insufficient. *Id.*
3. *Extension of Payment of One, on Promise to Pay Another, Promissory Note.—Answer.*—In an action by the payee, against the makers, on a promissory note, one of the defendants answered that he was merely surety for his co-maker, as the plaintiff well knew when the note was executed; and that, without the knowledge or consent of the surety, the payee had verbally extended the time of payment of the note, for a specified period, in consideration of the verbal promise of the principal to pay, before its maturity, a promissory note executed by him alone to the payee, which would not mature within the time of the extension of the note in suit.  
*Held*, on demurrer, that the agreement of extension was valid, and that the answer is sufficient. *Buck v. Smiley*, 481

PROCESS.

See GUARANTY, 5; SUPREME COURT, 5.

PROFESSIONAL GAMBLER

See CRIMINAL LAW, 55.

PROMISSORY NOTE.

- See CORPORATION, 11, 12; DECEDENTS' ESTATES, 1, 2, 6, 12; FIXTURE; INTEREST; INSTRUCTION, 6; JUDGMENT, 1; MARRIED WOMAN; PRINCIPAL AND SURETY, 1 to 8; REVIEW OF JUDGMENT, 2.
1. *Partial Answer.—Judgment.—Former Recovery.*—In an action against the maker and an endorser of a promissory note payable in bank, one paragraph of the complaint counted upon the note, alleging its endorsement to the plaintiff, while another paragraph counted upon a judgment recovered upon such note, against the maker and plaintiff, by one to whom the note had been endorsed by the plaintiff, and who had assigned the judgment to the plaintiff. The defendants, for answer to the whole complaint, pleaded such former recovery upon the note.  
*Held*, on demurrer, that such answer though sufficient as to the first, was insufficient as to the second, paragraph of the complaint, and therefore that the demurrer was properly sustained. *Pickrell v. Frankem*, 25
  2. *Want of Consideration.*—A promissory note was executed by the maker, for the amount of the debt of another, at the request of the creditor but without the knowledge or consent of the debtor, and afterward, on the death of the payee, at the request of a third person, the maker took up said note and executed, instead thereof, to such person and another severally, other promissory notes for the amount of the principal and interest of the first.  
*Held*, in an action on one of such notes, that it was given without consideration. *Wilson v. Tucker*, 41
  3. *Complaint Against Endorser.—Insolvency of Maker.—Demand.—Time.—Misjoinder of Parties.—Dismissal as to Maker.—Evidence.*—In an action by an assignee, against the maker and endorser, on a promissory note not payable in bank, commenced on the second day after its maturity, the complaint alleged that the maker then was, and long prior thereto had been, wholly and notoriously insolvent.

*Held*, on demurrer by the endorser, that the complaint is sufficient, that no demand upon him was necessary, and that the action was brought in time.

*Held*, also, that the maker and endorser can not be joined in the same action, unless the endorser be liable without suit having been first brought against the maker.

*Held*, also, that the dismissal of the action against the maker was proper.

*Held*, also, the endorser having pleaded the general denial, that such dismissal did not relieve the plaintiff from establishing the insolvency of the maker.

*Couch v. First National Bank, etc.*, 92

4. *Payable in Bank.—Negotiability.*—The negotiability of a promissory note payable in bank is not affected by the fact, that, by its terms, it is payable in a specified time, "or before, if made out of the sale" of a chattel therein named.  
*Woollen v. Ulrich*, 120
5. *Negligence.—Fraud.*—One who, relying upon the representations of another as to the legal character of an instrument which he is asked to sign, executes to the latter what proves to be a promissory note payable in bank, is guilty of negligence and is liable on the note to a *bona fide* endorsee thereof for value and before its maturity, though such representations were false, though he did not know he was executing a promissory note and though the consideration of the note has failed. *Ib.*
6. *Same.—Notice to Endorsee.—Answer.*—An answer averring such facts, and also that the note had been executed for a worthless patent-right, and that the endorsee, by reason of the general bad odor of the patent-right business, was bound to take notice of the fraudulent character of the note, is insufficient. *Ib.*
7. *Same.*—One who, supposing that he is executing a simple article of agreement, executes an instrument which may be so separated as to show him to have apparently executed a perfect promissory note payable in bank, is liable thereon to a *bona fide* endorsee thereof before maturity and for value. *Ib.*
8. *Payable in Bank.—Separate Actions Against Endorsers and Makers.—Jurisdiction.*—The *bona fide* endorsee, for value and before maturity, of a promissory note payable in bank, may maintain separate actions, and recover separate judgments, against each party liable thereon; but two actions thereon can not be brought at the same term of court, and any action thereon, to which the maker is a party, must be brought in the county where he resides.  
*Morrison v. Fishel*, 177
9. *Same.—Recovery Against Endorser.*—The recovery of a judgment by such holder, against an endorser, on such note, is no bar to a subsequent action thereon against the maker. *Ib.*
10. *Evidence that Endorsement was Collateral.*—Parol evidence is competent to establish the fact that an endorsement of a promissory note was intended to transfer the note simply as collateral security and not absolutely.  
*Hazard v. Duke*, 220
11. *Same.—Sale of Collateral.—Measure of Damages.*—An endorsee of a promissory note held as collateral to secure advances, who sells and transfers the same to another, is liable to the endorser for the value thereof at the time of sale; which value is, *prima facie*, the amount of the note when transferred, including interest. *Ib.*
12. *Same.—Compensation for Collecting.—Instruction.*—Such collateral endorsee can not complain of an instruction to the jury trying an action against him by the endorser, which directs them to charge him with interest on the balance due the plaintiff, after deducting advances by the defendant, interest thereon and compensation for collecting such note. *Ib.*
13. *Interest.*—Interest is allowable on money wrongfully or unreasonably withheld. *Ib.*

14. *Payable in Bank.—Action by Endorsee.—Answer.—Bribery of Prosecuting Attorney.*—In an action by an endorsee, against the maker, on a promissory note payable in bank, the latter answered alleging that the note was executed to the payee, who was a prosecuting attorney, solely to procure the dismissal of a criminal prosecution then pending, of which the payee had official charge; and that the plaintiff had taken an assignment of the note in suit, without consideration, and with notice of the facts alleged.

*Held*, on demurrer, that the answer is sufficient. *Collier v. Waugh*, 456

15. *Same.—Alteration.*—An answer in such action, alleging the alteration of the note, after its execution, by increasing its principal without the knowledge or consent of the defendant, and that the plaintiff had notice thereof, and had taken an assignment of the note without consideration, is sufficient. *Ib.*

16. *Payable in Bank.—Contract Susceptible of being Altered Into a Note.*—One who, in executing what he understands to be, and is, a contract other than a promissory note, executes an instrument which may be so mechanically separated as to present an apparently perfect promissory note payable in bank and bearing his signature as maker, is guilty of negligence, and is liable thereon to a *bona fide* endorsee thereof, for value and before maturity. *Noll v. Smith*, 511

17. *Bond of Corporation to Maker of Note, Assuming Payment Thereof.—Joint Action on Note and Bond.*—A bond executed by the secretary, and on behalf, of a certain corporation as principal obligor, and by certain sureties, recited that "whereas" the obligee "has heretofore sold and delivered to the above bound" corporation certain property of a specified value, described in a schedule attached thereto; and whereas such principal "has assumed and agreed to pay, as part of the consideration for" such property, certain debts owing from the obligee to others, amounting to a specified sum, including a certain promissory note not then matured, executed by the obligee of the bond to another, calling for a certain sum with ten per cent. interest, without relief, payable in bank and endorsed by certain persons; "Now therefore, if the said" corporation shall pay such debts "according to the tenor and effect" thereof, and hold the obligee harmless thereon, "this bond shall be void." But if the said obligee shall be compelled to pay the same, then he "may have his action on this bond, against said corporation and the individuals joining as sureties herein, for the sums so paid by him," etc., and the judgment therein "shall be without relief," etc., and draw ten per cent. interest, etc. Complaint on such note and bond, by the payee, against the makers and endorsers of the note, and the principal and sureties in the bond, alleging the bond to have been executed by the corporation and its sureties.

*Held*, on demurrer to the complaint, that the sureties are liable to the obligee, jointly with the principal, on the bond, immediately upon the failure of the principal to pay off such note at maturity, and without his paying the same to the holder.

*Held*, also, that, on non-payment of such note, the payee may maintain a joint action on the bond and note.

*Held*, also, that the demurrer admits the allegation that the bond in suit is the bond of the corporation.

*Held*, also, that the bond purports to have been given on a sufficient consideration.

*Held*, also, that there was no misjoinder of actions.

*Held*, also, that the plaintiff was entitled to a judgment bearing ten per cent. interest, and without relief.

*South Side Planing Mill Ass'n v. Cutler & Savidge Lumber Co.*, 560

## PROSECUTING ATTORNEY.

See PROMISSORY NOTE, 14.

1. *Circuit Prosecutor.—Duties of are Statutory.—Constitutional Law.*—The duties of the prosecuting attorneys of the circuit courts of this State are prescribed by statute, and not by the constitution.  
*The State, ex rel., v. Morrison, 141*
2. *Same.—Power of Legislature.*—The Legislature has the right to increase or diminish the duties of such prosecuting attorneys, or to divide them with the prosecuting attorneys of other courts. *Ib.*
3. *Same.—Act Abolishing Common Pleas Courts.*—By the act abolishing common pleas courts, the duty of the prosecuting attorneys of those courts to prosecute criminal cases before justices of the peace was transferred to and imposed upon the prosecuting attorneys of the circuit courts. *Ib.*
4. *Same.—Criminal Circuit Prosecutor.—Prosecutions before Justices.*—In all counties where criminal circuit courts have been established, the prosecuting attorneys of those courts have the exclusive right to prosecute criminal cases before justices of the peace, and to collect the docket fees assessed in such cases. But, where there is no criminal circuit court, such right belongs to the prosecuting attorneys of the proper circuit courts. *Ib.*
5. *Circuit Prosecutor.—Constitutional Law.*—The office of the prosecuting attorney of a circuit court is one provided for by the constitution, which fixes the term of office at two years; and the Legislature can neither abolish the office nor abridge the term thereof. *Moser v. Long, 189*
6. *Same.—Circuit Districting Act of 1873 Construed.*—The act of March 6th, 1873, 1 R. S. 1876, p. 880, dividing "the State into circuits for judicial purposes, \* \* abolishing the courts of common pleas," etc., by implication provided that prosecuting attorneys of the several judicial circuits theretofore existing should continue to discharge their duties, as such, in the several circuits in which, under the new districting, they happened to reside. *Ib.*
7. *Same.—Election of Prosecutor in 1873.*—Section 82 of such act contemplated the election, on the second Tuesday of October, 1873, of prosecuting attorneys for such new circuits only as had no prosecuting attorney residing within them, on the taking effect of the act. *Ib.*
8. *Same.—Vacancy.—Appointee.*—Upon the resignation of a prosecuting attorney residing within a circuit created by such act, and the appointment of his successor by the Governor, after the taking effect of such act but prior to the second Tuesday of October, 1873, such appointee was entitled to hold the office until the election of his successor at the election held on the second Tuesday of October, 1874. *Ib.*
9. *Same.*—The election of a successor to such appointee on the second Tuesday of October, 1873, was invalid. *Ib.*

## PUBLIC LANDS.

See WATERCOURSE, 1.

## QUITCLAIM.

See MISTAKE.

## RAILROAD.

See APPEAL BOND; CRIMINAL LAW, 53.

*Killing Stock.—Evidence.—Venue.*—In an action under the statute, against a railroad company, for killing stock, the evidence must affirmatively show either directly or by inference, that the stock was killed within the county where the action was brought.

*The Louisville, etc., R. W. Co. v. Breckenridge, 113*

**REAL ESTATE, ACTION TO QUIET TITLE.**

See CONVEYANCE, 8; CORPORATION, 9; DESCENTS, 1.

**REAL ESTATE, ACTION TO RECOVER.**

See CONVEYANCE; INFANT, 1; INJUNCTION.

*Defendant Claiming Equitable Title.—Making New Parties.*—In an action by one claiming the legal title to real estate, to recover possession and quiet title, a third person, claiming an equitable title thereto, may, on a proper showing, be made a party defendant. *Hampson v. Fall*, 882

**RECAPTURE.**

See HABEAS CORPUS.

**RECEIVER.**

See CORPORATION, 11.

**RECOGNIZANCE.**

See BASTARDY, 2; REPLEVIN BAIL.

**RECORD.**

See GUARDIAN AND WARD, 6; INFANT, 8; INSTRUCTION, 10; NEW TRIAL, 8; SUPREME COURT, 1, 8, 8, 11, 12, 16.

**RECORD OF INSTRUMENT.**

See DECEDENTS' ESTATES, 9; DITCHES AND DRAINS, 2.

**RECORDING INSTRUMENT.**

See CONTRACT, 8; MORTGAGE, 8.

**RECOUPMENT.**

See INTEREST.

**REDEMPTION.**

See MORTGAGE, 2; TAX TITLE.

**REFORMING INSTRUMENT.**

See CONVEYANCE, 1, 2; MISTAKE; MORTGAGE, 4 to 6.

**REHEARING.**

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See CORPORATION, 4; DITCHES AND DRAINS, 8, 6.

**REPLEVIN BAIL.**

See HABEAS CORPUS, 2.



1. *Stay of Execution.—Effect of.—Judgment.*—The effect of a recognizance of replevin bail for the stay of execution upon a judgment is that of a judgment confessed by the recognizor for the amount of the judgment, with interest thereon and costs accrued and to accrue.  
*Vincennes National Bank v. Cockrum*, 229
2. *Same.—Common Law.*—Such a recognizance is of statutory origin, being unknown at common law. *Id.*
3. *Same.—Informality Cured.*—Since the enactment of section 790 of the code of this State, such a recognizance is not rendered void, nor is the replevin bail discharged, for want of form or substance, or recital, or condition in the recognizance. *Id.*
4. *Same.—Recognizance for Part Binds for the Whole.*—One who enters his recognizance as replevin bail for the stay of execution on a judgment can not limit the extent of his liability, but at once becomes liable for the whole of the judgment, with interest thereon and costs, even though, by the terms of his recognizance, he undertakes thereby to limit his liability to a specified part of the judgment. *Id.*

#### REPLEVIN.

See JUSTICE OF THE PEACE, 4.

1. *Replevin by Church Corporation.—Bond Executed by Surety Only.*—A bond signed by the surety only, in replevin by a church corporation, before a justice of the peace, is sufficient.  
*Philippi Christian Church v. Harbaugh*, 240
2. *Same.—Informality of Bond.*—Mere informality in the bond filed in such action is not fatal, but is cured by section 790 of the practice act. *Id.*

#### REPORT.

See DECEDENTS' ESTATES, 3 to 5; GUARDIAN AND WARD, 4.

#### REPUTATION.

See CRIMINAL LAW, 7.

#### RESISTING ARREST.

See CRIMINAL LAW, 22.

#### REVIEW OF JUDGMENT.

1. *Failure to Default Defendant.*—Where a defendant has been served with process, the fact that, either with or without an appearance by him, he was not defaulted, is not ground sufficient to review or reverse a valid judgment rendered therein against him. *Doherty v. Chase*, 73
2. *Complaint on Bond Securing Performance of Contract.—Principal and Agent.—Principal and Surety.*—In an action by the obligee, against the principal and surety, on a bond executed to secure the performance of a written contract appointing the principal an agent of the plaintiff to sell certain articles, and binding him to turn over notes and money, less his commissions, to guarantee the plaintiff against the loss of any such property, and to furnish a satisfactory bond, etc., the complaint alleged, as breaches of the bond, which was broader in its terms than the contract, that the principal, in the course of such business, had received and refused to turn over sums of money belonging to the plaintiff, and had turned over notes of insolvent makers, etc.  
*Held*, in a proceeding to review a judgment rendered in such action against the defendants, that the complaint therein was sufficient. *Id.*
3. *Complaint.—Incompetent Witness.—Bill of Exceptions.—Common Pleas Judge.*—In an action to review a judgment rendered by a certain common pleas court, for error of law in permitting the opposite party to testify as a witness on the trial of the cause, the record set out in the complaint for review embodied a bill of exceptions containing the evi-

dence of such witness, signed by the judge of such court after the taking effect of the act of March 6th, 1873, 1 R. S. 1876, p. 380, dividing the State into circuits and abolishing the court of common pleas.

*Held.* on demurrer, that such judge had no authority to sign the bill of exceptions, that it should have been signed by the judge of the proper circuit court, and that the complaint is insufficient. *Reed v. Worland*, 216

RIOT.

See CRIMINAL LAW, 19.

RIPARIAN OWNER.

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RIVER.

See WATERCOURSE.

ROBBERY.

See CRIMINAL LAW, 1 to 3.

SALE.

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See CRIMINAL LAW, 16.

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See CRIMINAL LAW, 23.

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See CRIMINAL LAW, 22.

SET-OFF.

See CORPORATION, 10; DECEDENTS' ESTATES, 5.

SETTLEMENT.

See INSTRUCTION, 3 to 6.

SHERIFF'S RETURN.

See GUARANTY, 5.

SHERIFF'S SALE.

See CONVEYANCE, 2; TRUSTS.

SHORT-HAND REPORTER.

See BILL OF EXCEPTIONS.

SPECIAL DEMURRER.

See PRACTICE, 10.

SPECIAL FINDING.

See MECHANIC'S LIEN; WARRANTY, 4.

STATUTE CONSTRUED.

See CORPORATION, 4; CRIMINAL LAW, 58; DESCENTS, 3.

STATUTE OF FRAUDS.

See CONTRACT, 14, 15; DECEDENTS' ESTATES, 7.

STAY OF EXECUTION.

See REPLEVIN BAIL.

## SUBSCRIPTION.

See CONTRACT, 1, 2, 5 to 10.

## SUPERIOR COURT.

See SUPREME COURT, 7.

## SUPERSEDEAS.

See ATTORNEY, 8.

## SUPERVISOR.

*Repairing Highway.—Overflowing Adjacent Land.—Remedy of Owner.—Trespass.*—Where a supervisor, in good faith and in the proper discharge of his duties, overflows adjoining lands, the remedy of the owner is by petition to the township trustee for damages, and not by an action against the supervisor personally. *Spitznogle v. Ward*, 30

## SUPREME COURT.

See ATTORNEY, 5, 7, 8; CONVEYANCE, 1; CRIMINAL LAW, 6, 13, 17, 20, 29, 58; DECEDENTS' ESTATES, 10; GUARDIAN AND WARD, 6; INFANT, 3; INSTRUCTION, 1.

1. *Record.—New Trial.—Evidence.*—Where the evidence is not in the record, the Supreme Court can not consider a motion for a new trial, based upon matters relating solely to the evidence. *Pickerell v. Frankem*, 25
2. *Judgment exceeding Finding.*—A party can not be heard to complain in the Supreme Court, that judgment was rendered in his favor by the lower court, for an amount exceeding that found by the court to be due him. *Swain v. Hardin*, 85

3. *Record.—Evidence.—Motion to Distribute Moneys realized on Execution.*—A judgment in favor of the State, on behalf of several relators, having been rendered by a certain circuit court, against a certain defendant, and several separate executions issued thereon having been returned by the sheriff, one of such relators moved the court in writing for a distribution of money alleged to have been realized on such executions, to which motion the other relators answered, and the motion was denied, to which exception was reserved.

*Held*, by the Supreme Court, the record containing only such motion, the ruling thereon, and the exception thereto, that the ruling is presumed to be right.

*Held*, also, that such judgment and executions, never having been offered in evidence, form no part of the record. *State, ex rel., v. Steinmeier*, 87

4. *Judgment of.*—The decisions of the Supreme Court are made by the whole court, unless the dissent or absence of some one of the judges thereof is noted in the decision.

*Vincennes National Bank v. Cockrum*, 229

5. *Dismissal of Appeal.—Notice to Co-Party.*—An appeal to the Supreme Court, by one of several defendants against whom a judgment has been rendered, will be dismissed for want of notice of the appeal to his co-parties. *Pierson v. Hart*, 254

6. *Weight of Evidence.*—The Supreme Court, on appeal, will not disturb a verdict or finding on the mere weight of evidence. *Pratt v. Smith*, 284

7. *Superior Court.—Assignment of Error.*—On an appeal from the special to the general term of the superior court, no assignment of error was made; but, on appeal thence to the Supreme Court, error was there assigned upon the judgment of both general and special terms.

*Held*, that the assignment of error upon the judgment at special term was too late, that the assignment of error upon the judgment at general term

raised no question not there assigned on appeal from special term, and that, as no error was assigned on such appeal, no question is presented to the Supreme Court for decision.

*State, ex rel., v. Terre Haute, etc., R. R. Co., 297*

8. *Diminution of Record.—Mistake, Inadvertence, Surprise, or Excusable Neglect.*—A party appealing a cause must rely upon his own diligence and not upon that of the clerk of the lower court, to procure and file a correct transcript of the cause; and the lapse of time, after an omission by the clerk of an essential part of the record, whereby the error relied upon by him can not be considered by the appellate court, will prevent his obtaining relief from such omission as a mistake, an inadvertence, a surprise or an excusable neglect. *Ib.*
9. *Same.—Rehearing.*—A rehearing will not be granted for the purpose of amending the transcript. *Ib.*
10. *Affirming Judgment.—Dismissal of Appeal.*—The Supreme Court, on appeal, will not dismiss the appeal, but will affirm the judgment, where no question is presented though the appeal was properly taken. *Ib.*
11. *Evidence.—Record.—Bill of Exceptions.*—Where, on appeal to the Supreme Court, it appears by the record that it does not contain all the evidence given on the trial of the cause, that court will not disturb the judgment rendered below, on any question as to the weight or sufficiency of the evidence. *Brownlee v. Hare, 811*
12. *Assignment of Error.—Motion.—Record.*—No question can be presented to the Supreme Court in relation to a motion made in the court below, which the record shows was never decided. *Ib.*
13. *Judgment without Objection and Exception.—Contempt.*—A judgment was rendered against an administrator, without objection or exception of record, that he be attached as for contempt of court, should he fail to pay over certain trust funds in his hands, within a certain time. By a bill of exceptions it appeared, that, at the time of its rendition, he objected to such judgment as exceeding the power of the court.  
*Held*, that no question as to the form or substance of such judgment is presented to the Supreme Court.  
*Held*, also, that, to present such question, the record should show an objection to the rendition of such judgment, the overruling of the objection, and an exception to the ruling. *Ib.*
14. *Instructions.—New Trial.—Assignment of Error.*—Error in giving instructions to a jury is ground for a new trial, but is not a proper assignment of error, in the Supreme Court. *Hampson v. Fall, 382*
15. *Appeal.—Action Originating Before Justice.—Amount in Controversy.*—An appeal to the Supreme Court, in an action originating before a justice of the peace, will be dismissed on motion, for want of jurisdiction, where it affirmatively appears by the record that the amount involved, exclusive of costs, does not exceed fifty dollars.  
*Louisville, etc., R. W. Co. v. Jackson, 398*
16. *Motion to Strike Out Part of Pleading.—Bill of Exceptions.—Record.*—To present to the Supreme Court any question upon the ruling, on a motion to strike out parts of a pleading, both the motion and the ruling must be made part of the record by a bill of exceptions.  
*Jameson v. Board of Comm'rs, etc., 524*
17. *Weight of Evidence.*—Where there is any legal evidence tending to support each material fact necessary to authorize the finding or verdict rendered in a cause, the Supreme Court will not disturb it, though in the judgment of that court, the preponderance of the evidence is against it.  
*Swales v. Southard, 557*

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## SURETY.

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## SURPRISE.

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1. *Tax Sale*.—A sale of land for taxes legally assessed may be illegal and void. *McWhinney v. Brinker*, 360
2. *Sale Without Demand for Personalty.—Tender of Redemption Money.—Evidence*.—A sale of land for taxes, without a demand upon the owner for personal property, of which he has sufficient subject to levy and sale, is illegal and void; but, in an action to set aside such sale, and to declare the certificate thereof void, the plaintiff must both plead and prove a tender of the amount necessary to redeem. *Ib.*
3. *Same.—Liability of County to Purchaser*.—A decree setting aside such sale as void renders the county liable to the defendant, for the amount paid by him, unless he has received the same from the plaintiff. *Ib.*
4. *Same.—Land Illegally Sold Still Liable*.—The court has no power, in an action to set aside an illegal sale for legally assessed delinquent taxes, to decree the lands to be discharged from the lien of such taxes, as, under section 227 of the assessment act, 1 R. S. 1876, p. 124, the lands should be again placed upon the delinquent list. *Ib.*

## TENDER.

See CONVEYANCE, 4; TAX TITLE, 2.

## THREATS.

See CRIMINAL LAW, 35, 38, 39, 42, 49.

## TIME.

See CRIMINAL LAW, 18; PROMISSORY NOTE, 3.

## TOLL-GATE.

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## TORT.

See MALPRACTICE.

## TOWNSHIP.

See COMMON SCHOOLS; SUPERVISOR.

## TOWNSHIP TRUSTEE.

See COMMON SCHOOLS; SUPERVISOR.

## TRESPASS.

See MALPRACTICE; SUPERVISOR; TRESPASSING ANIMALS.

*Complaint for Overflowing Lands.—License.—Defence*.—In an action against an adjoining proprietor, to recover damages for overflowing the lands of the plaintiff by means of a ditch constructed by the defendant on his own land, the complaint need not aver that such act of the defendant was wrongful and unlawful or without license; as the fact that his act was rightful and lawful, or one which he had license to do, is matter of defence. *Wilkinson v. Applegate*, 98

## TRESPASSING ANIMALS.

1. *Adjoining Proprietors.—Partition Fence.—Instruction*.—In an action for damages, against an adjoining proprietor, for injury to a crop growing

within the plaintiff's enclosure, by the cattle of the defendant, which had broken over a partition fence and entered upon such crop, wherein a third person had testified that he was the owner of an undivided interest in such crop, it was not error in the court, in its instructions to the jury, to refer to the ownership claimed by the witness.

*Hinshaw v. Gilpin*, 116

2. *Same.—Agreement to Maintain Partition Fence.—Witness.*—It was not error in such action to instruct the jury, that, if the defendant's cattle had broken over that part of such fence which it was the plaintiff's duty to maintain, the plaintiff could not recover unless he had established "by the testimony of skilful men," that "the fence was such as good husbandmen generally keep." *Id.*

#### TRIAL.

See PRACTICE, 5, 7.

#### TRUSTS.

1. *Lands Purchased by One with Moneys of Another.—Implied Trust.—Mortgage by Holder of Legal Title.—Sheriff's Sale to Another.*—In an action to recover, and quiet title to, real estate, a defendant filed a counter-claim, alleging that, upon his enlisting in the United States army, he and his mother had agreed that all moneys remitted by him to her should be invested by her in real estate for him; that, pursuant to such agreement, he had remitted to her certain sums of money, with which she had purchased the real estate in question, but had taken the title thereto in her own name; that, without his knowledge or consent, she and her husband had mortgaged the same, to secure the husband's debt, to one who had notice of the trust; and that the plaintiff claimed title only under a sale on foreclosure of such mortgage.

*Held*, on demurrer, that the counter-claim is sufficient. *Hampson v. Fall*, 882

2. *Foreclosure of Endorsee.—Trust Implied Against Married Woman.*—On the trial of such action it was established, that the allegations of the counter-claim were true; that the deed to the mother had been duly recorded; that the mortgagee had taken the mortgage with notice of the defendant's claim; that the mortgagee had assigned the mortgage debt to the plaintiff and another, for value, but without notice of the trust; and that the plaintiff, on foreclosure of the mortgage, had purchased the realty at a sheriff's sale, and had received a sheriff's deed therefor.

*Held*, that there was an implied trust in the land in favor of the defendant, as against both the grantee and mortgagee, but that the plaintiff, having no notice thereof, is not bound thereby. *Id.*

#### TURNPIKE.

See TOLL-GATE.

#### ULTRA VIRES.

See CONTRACT, 9; CORPORATION, 8.

#### UNCERTAINTY.

See INSTRUCTION, 8; MISTAKE; PLEADING, 4; PRACTICE, 6, 9, 10.

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*Removal of Cause from State Court.—Application and Bond.*—A court of this State has the right to judicially pass upon the sufficiency of an application to remove a cause pending therein to a United States court, and of the bond accompanying the same. *McWhinney v. Brinker*, 860

#### UNITED STATES LANDS.

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*Held*, that there was an implied trust in the land in favor of the defendant, as against both the grantee and mortgagee, but that the plaintiff, having no notice thereof, is not bound thereby. *Ib.*

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See TOLL-GATE.

#### ULTRA VIRES.

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See INSTRUCTION, 8; MISTAKE; PLEADING, 4; PRACTICE, 6, 9, 10.

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## WARRANTY.

See FIXTURE.

1. *Breach of, as a Defence.—Presumed to be Parol, if not Alleged to be Written.—Evidence.*—Where a breach of an alleged warranty of a chattel is relied upon as a defence to an action for the contract price, it is presumed, where such warranty is not alleged by the answer to be in writing, that it was merely verbal; and, in such case, a written or printed instrument, claimed to be the warranty, is not admissible as evidence to sustain the warranty alleged. *Morgan v. Gaar, Scott & Co., 213*
2. *Same.—Price-List.—Correspondence.*—A printed price-list issued by the plaintiff, and also correspondence between him and the defendant, fall within the above rule. *Id.*
3. *Breach.—Measure of Damages.—Sale of Live-Stock.*—The measure of damages for a breach of warranty of the soundness of live-stock is the difference between the real value of the stock at the time it was sold and the value which it would then have had if it had been as warranted; and this measure can not be increased by evidence of care and attention bestowed upon, and feed given to, the stock. *Cline v. Myers, 304*
4. *Same.—Striking Out Evidence Rendered Harmless by Special Finding.*—

Where the jury trying the case has found specially that there was no breach of the warranty, error in striking out evidence measuring the damages arising from the breach is not available. *Ib.*

## WATER.

See WATERCOURSE, 4 to 6.

## WATERCOURSE.

1. *Wabash River Navigable.—Riparian Ownership.*—The Wabash river is a navigable stream, the bed of which has neither been surveyed nor sold. *Dawson v. James*, 162
2. *Obstruction of.—Action by Administrator for Damages.—Pleading.—Heir.*—In an action by one styling himself administrator of the estate of a deceased land-owner, against an adjoining proprietor, for obstructing the passage of drift-wood theretofore carried across the lands of both by the overflow of an adjacent river during freshets, the complaint averred, that the plaintiff, by inheritance from the decedent, was the sole owner of the lands injured by such obstruction.  
*Held*, on demurrer, that such action can not be maintained by the plaintiff as administrator, but that the averments of the complaint show a right of action in him personally. *Taylor v. Fickas*, 167
3. *Same.—Rights of Administrator in Lands of his Decedent.*—In this State, an administrator has no rights, as such, in the lands of his decedent, except to subject the same to the payment of debts, if necessary, or in the absence of heirs or devisees. *Ib.*
4. *Same.—Riparian Proprietor.—Property of, in Watercourse.*—A riparian proprietor has a mere usufruct property in water flowing over his lands in its regular channel. *Ib.*
5. *Same.—Subterranean Water.—Surface Water.—Overflow During Freshet.*—Water which percolates through the soil, beneath the surface, without a known channel, water which temporarily flows upon or over the surface, from the falling of rains and the melting of snows, without a channel, but simply as the natural or artificial elevations and depressions may guide it, and water temporarily flowing from a watercourse, over adjacent lands, without a channel, on the overflow of such watercourse by reason of freshets, form part of the realty and belong to the owner thereof. *Ib.*
6. *Same.—Obstructing Overflow Carrying Drift-Wood.*—The proprietor of certain lands sued an adjoining proprietor for obstructing the passage of drift-wood carried by the overflow of an adjacent watercourse during freshets, by planting a row of trees upon the land of the defendant, and along the line dividing their lands, by means of which the drift-wood was lodged upon the lands of the plaintiff.  
*Held*, that no action lies for such obstruction. *Ib.*

## WEIGHT OF EVIDENCE.

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## WIDOW.

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## WILL.

See CONTRACT, 15.

1. *Contesting Validity of.—Complaint.—Necessary Averments*—Where in an action to contest the alleged last will of a testator, the complaint neither alleges the death of the testator, nor any legal interest, in the plaintiff, in the subject-matter, the complaint is insufficient on demurrer. *Schmidt v. Bomersbach*, 58

2. *Same.—Copy of Will.*—The will is not the foundation of such action, and therefore a copy thereof, attached to the complaint, can not be looked to in determining its sufficiency. *Ib.*
3. *Construction of.—Legacy Payable out of Capital Stock.—Execution Against Legatee.—Injunction by Executor.*—The owner of a certain number of shares of the capital stock of an incorporated gas and coke company died testate, devising to A. and certain other legatees, severally, specified sums of money "to be paid out of the gas and coke company stock," and the residue to yet other legatees, and directing that his estate should be settled "without administration thereon or controversy between" the legatees. An administrator with the will annexed having been appointed, an execution against A. was levied upon a number of such shares equal in value to his legacy, whereupon the administrator brought an action to enjoin sale upon the execution.  
*Held*, on demurrer to the complaint, that the devise to A. was not a specific legacy; but that, whether it was general, demonstrative or specific, it was not subject to execution. *Stout v. LaFollette*, 365

## WITNESS.

See CONVEYANCE, 6; REVIEW OF JUDGMENT, 3; TRESPASSING ANIMAL, 2.

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